Supreme Court, U.S.
FILED
SEP 19 1994
OFFICE OF THE CLERK

No. 93-768

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MILWAUKEE BREWERY WORKERS' PENSION PLAN,
Petitioner,
v.
JOS. SCHLITZ BREWING COMPANY and
THE STROH BREWERY COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR RESPONDENTS

RICHARD K. WILLARD
(Counsel of Record)
SARA E. HAUPTFUEHRER
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795
(202) 429-3000

JAMES W. GREER
DAVID C. HERTEL
WHYTE HIRSCHBOECK DUDEK S.C.
Suite 2100
111 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 273-2100

Counsel for Respondents

September 19, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF THE CASE	2
A. Defined Benefit Pension Plans	3
B. Funding Rules Under ERISA	6
C. Title IV of ERISA—Termination Insurance	8
D. Withdrawal Liability Under MPPAA	9
SUMMARY OF ARGUMENT	16
ARGUMENT	18
I. THE STATUTE DOES NOT AUTHORIZE THE ASSESSMENT OF WITHDRAWAL YEAR INTEREST	18
A. The Statute Does Not Explicitly Authorize the Assessment of Withdrawal Year Interest	18
B. Use of the Word "Amortize" in the Statute Does Not Require the Addition of Withdrawal Year Interest	19
C. The "Withdrawal Liability," as Defined in the Statute, Does Not Include Withdrawal Year Interest	21
D. Assessment of Withdrawal Year Interest Requires a Strained and Illogical Reading of the Statutory Language	24
II. THE LEGISLATIVE HISTORY CONFIRMS THAT THE STATUTE DOES NOT AUTHORIZE THE ASSESSMENT OF WITHDRAWAL YEAR INTEREST	27
A. The Legislative Purpose Does Not Require the Statute to Be Interpreted So as to Maximize the Amount of Withdrawal Liability	28

TABLE OF CONTENTS—Continued

	Page
B. The Drafting History Demonstrates That No Provision of the Statute Was Adopted with the Intent or Effect of Requiring Withdrawal Year Interest	30
1. The Original PBGC Proposal	31
2. The Initial Mark-up	31
3. Subsequent Changes and Final Enactment	34
4. Summary of the Impact of Drafting Changes on Interest Accrual	35
C. Petitioner's Reading of the Legislative History Is Incorrect	37
D. The Legislative History Demonstrates That Withdrawal Year Interest Is Not Required	39
III. THE STATUTORY SCHEME DOES NOT RESULT IN AN UNFAIR "GAP"	40
A. In Most Cases Any "Gap" Will Be Considerably Less Than One Year	41
B. Other Aspects of the Statutory Scheme Offset the Effect of Any "Gap"	43
C. The Statute Rationally Sacrifices Some Precision to Enhance Efficiency	45
D. The Court Should Not Resolve Doubts Against Withdrawing Employers	47
CONCLUSION	50

TABLE OF AUTHORITIES

CASES

	Page
Board of Governors v. Dimension Fin. Corp., 474 U.S. 361 (1986)	28
Borden, Inc. v. Bakery & Confectionery Union & Indus. Int'l Pension, 974 F.2d 528 (4th Cir. 1992)	2
Carl Colteryahn Dairy, Inc. v. Western Pennsylvania Teamsters & Employers Pension Fund, 8 F.3d 810 (3d Cir. 1993)	3
Central States Pension Fund v. Central Transp., Inc., 472 U.S. 559 (1985)	43
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	9
Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust, 113 S. Ct. 2264 (1993)	2, 5, 6, 7, 43, 49
Connolly v. PBGC, 475 U.S. 211 (1986)	4
Huber v. Casablanca Indus., 916 F.2d 85 (3d Cir. 1990), *cert. dismissed*, 113 S. Ct. 1070 (1993)	2, 9, 23, 25, 43
Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan, 3 F.3d 994 (7th Cir. 1993)	2, 12, 24
Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985)	17
Mertens v. Hewitt Assocs., 113 S. Ct. 2063 (1993)	17
Nachman Corp. v. PBGC, 446 U.S. 359 (1980)	17
PBGC v. LTV Corp., 496 U.S. 633 (1990)	8, 28
PBGC v. R.A. Gray & Co., 467 U.S. 717 (1984)	8, 9, 18, 49
Rodriguez v. United States, 480 U.S. 522 (1987)	28
United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc., 787 F.2d 128 (3d Cir. 1986), *aff'd by equally divided court sub nom. PBGC v. Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987)	48
Vinson & Elkins v. Commissioner, 7 F.3d 1235 (5th Cir. 1993)	5, 50
Vinson & Elkins v. Commissioner, 99 T.C. 9 (1992), *aff'd*, 7 F.3d 1235 (5th Cir. 1993)	6, 7, 49
Wachtell, Lipton, Rosen & Katz v. Commissioner, 26 F.3d 291 (2d Cir. 1994)	5

TABLE OF AUTHORITIES—Continued

PBGC ADMINISTRATIVE DECISIONS — Page

Opinion No. 85-1, 1985 PBGC LEXIS 32 (Jan. 4, 1985) 14, 47

STATUTES

Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 832 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461 (1988)) ..... *passim*

ERISA § 2, 29 U.S.C. § 1001 2

ERISA § 3(34), 29 U.S.C. § 1002(34) 4

ERISA § 3(35), 29 U.S.C. § 1002(35) 4

ERISA § 3(37), 29 U.S.C. § 1002(37) 3

ERISA § 103(a)(4)(A), 29 U.S.C. § 1023(a)(4)(A) 7

ERISA § 203, 29 U.S.C. § 1053 10

ERISA § 302, 29 U.S.C. § 1082 6

ERISA § 302(c)(9), 29 U.S.C. § 1082(c)(9) 7

ERISA § 404(a), 29 U.S.C. § 1104(a) 43

ERISA § 409(a), 29 U.S.C. § 1109(a) 43

ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) 43

ERISA § 4022(a), 29 U.S.C. § 1322(a) 8

ERISA § 4002(a), 29 U.S.C. § 1302(a) 8

ERISA § 4022A, 29 U.S.C. § 1322a 8

ERISA § 4062(b), 29 U.S.C. § 1362(b) 8

ERISA § 4201(a), 29 U.S.C. § 1381(a) 10

ERISA § 4201(b)(1), 29 U.S.C. § 1381(b)(1) 11, 12, 14, 21, 24

ERISA § 4202, 29 U.S.C. § 1382 11

ERISA § 4203, 29 U.S.C. § 1383 10

ERISA § 4205, 29 U.S.C. § 1385 10

ERISA § 4206, 29 U.S.C. § 1386 ..... 13, 42

ERISA § 4209, 29 U.S.C. § 1389 ..... 12, 47

ERISA § 4211, 29 U.S.C. § 1391 12

ERISA § 4211(b), 29 U.S.C. § 1391(b) 12

ERISA § 4211(b)(2)(E)(i), 29 U.S.C. § 1391(b)(2)(E)(i) 11

ERISA § 4211(c)(3), 29 U.S.C. § 1391(c)(3) 14

TABLE OF AUTHORITIES—Continued

Page

ERISA § 4216(a)(1)(B), 29 U.S.C. § 1396(a)(1)(B) 11

ERISA § 4219(b)(1)(A), 29 U.S.C. § 1399(b)(1)(A) 21

ERISA § 4219(c)(1)(A)(i), 29 U.S.C. § 1399(c)(1)(A)(i) ..... *passim*

ERISA § 4219(c)(1)(A)(ii), 29 U.S.C. § 1399(c)(1)(A)(ii) 13, 20

ERISA § 4219(c)(1)(B), 29 U.S.C. § 1399(c)(1)(B) 14, 24

ERISA § 4219(c)(1)(C)(i), 29 U.S.C. § 1399(c)(1)(C)(i) 13

ERISA § 4219(c)(1)(D), 29 U.S.C. § 1399(c)(1)(D) 9

ERISA § 4219(c)(2), 29 U.S.C. § 1399(c)(2) 15, 25, 40

ERISA § 4219(c)(3), 29 U.S.C. § 1399(c)(3) 14, 18

ERISA § 4219(c)(4), 29 U.S.C. § 1399(c)(4) 25

ERISA § 4219(c)(5), 29 U.S.C. § 1399(c)(5) 18

ERISA § 4219(c)(6), 29 U.S.C. § 1399(c)(6) 19, 20

ERISA § 4221(a)(1), 29 U.S.C. § 1401(a)(1) 50

ERISA § 4221(a)(3), 29 U.S.C. § 1401(a)(3) 44

ERISA § 4221(b)(2), 29 U.S.C. § 1401(b)(2) 50

ERISA § 4221(c), 29 U.S.C. § 1401(c) 44, 50

ERISA § 4225, 29 U.S.C. § 1405 14

ERISA § 4261, 29 U.S.C. § 1431 8

I.R.C. § 412 6

I.R.C. § 412(a) 6

I.R.C. § 412(b)(1) 6

I.R.C. § 412(b)(2) 6

I.R.C. § 412(b)(2)(B)(i) 41

I.R.C. § 412(b)(2)(B)(ii) 7, 41

I.R.C. § 412(b)(2)(B)(iv) 8, 45

I.R.C. § 412(b)(2)(B)(v) 8

I.R.C. § 412(b)(3) 6

I.R.C. § 412(b)(3)(B)(iii) 8

I.R.C. § 412(c)(9) 7

Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub. L. No. 96-364, 94 Stat. 1208, 1216, 1227, 1267 (1980) (codified as amended at 29 U.S.C. §§ 1381-1461 (1988)) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

MPPAA § 3, 29 U.S.C. § 1001a 2
Deficit Reduction Act of 1984, § 558, Pub. L. No. 98-369, 98 Stat. 899 (1984) 49

REVENUE RULINGS

Rev. Rul. 56-596, 1956-2 C.B. 288 42

LEGISLATIVE MATERIALS

Bills

H.R. 3904, 96th Cong., 1st Sess. (1979) 27, 10a
S. 1076, 96th Cong., 1st Sess. (1979) 27, 31, 10a

Congressional Record

125 Cong. Rec. 9,702 (1979) 27, 10a
125 Cong. Rec. 9,783 (1979) 27, 10a
126 Cong. Rec. 7,489 (1980) 11a
126 Cong. Rec. 8,864 (1980) 11a
126 Cong. Rec. 11,990 (1980) 17, 29, 30, 34, 11a
126 Cong. Rec. 12,176 (1980) 11a
126 Cong. Rec. 19,598 (1980) 34, 11a
126 Cong. Rec. 20,148 (1980) 29, 30, 34, 11a
126 Cong. Rec. 20,189 (1980) 35, 11a
126 Cong. Rec. 23,003 (1980) 30, 35, 39, 11a
126 Cong. Rec. 23,280 (1980) 29, 35, 11a
126 Cong. Rec. 23,645 (1980) 11a
126 Cong. Rec. 24,541 (1980) 11a
126 Cong. Rec. 26,040 (1980) 35, 11a
126 Cong. Rec. 26,361 (1980) 35, 11a

Reports & Committee Prints

H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2918 .... 11, 28, 29, 34, 47, 11a
H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 2 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2993 .... 29, 30, 34, 11a
H.R. Conf. Rep. No. 1343, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S.C.C.A.N. 3066 .... 35, 11a
S. Rep. No. 570, 95th Cong., 1st Sess., *reprinted in* 1977 U.S.C.C.A.N. 4128 27

TABLE OF AUTHORITIES—Continued

Page

Description of H.R. 3904 (As reported by the Comm. on Education and Labor) Relating to Multiemployer Pension Plan Amendments Prepared for Use of the House Comm. on Ways and Means (Jt. Comm. Print 1980) 33, 11a

Hearings

Hearings on the Multiemployer Pension Plan Amendments Act of 1979 before the Task Force on Welfare and Pension Plans of the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor, 96th Cong., 1st Sess. (1979) 31, 32, 48, 10a
Multiemployer Pension Plan Termination Insurance Program, Hearing before the Subcomm. on Oversight of the House Comm. on Ways and Means, 96th Cong., 1st Sess. (1979) 39, 11a
The Multiemployer Pension Plan Amendments Act of 1979, Hearing before the House Comm. on Ways and Means, 96th Cong., 2d Sess. (1980) 21, 11a
Multiemployer Pension Plan Amendments Act of 1979, Hearings before the Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess. (1979) 11a
Pension Plan Termination Insurance for Multiemployer Pension Plans, Hearing before the Subcomm. on Private Pension Plans and Employee Fringe Benefits of the Senate Comm. on Finance, 96th Cong., 2d Sess. (1980) 11a

MISCELLANEOUS

Dan McGill & Donald S. Grubbs, Jr., *Fundamentals of Private Pension* 266-70 (6th ed. 1989) 5, 6, 7, 12, 42, 44

Wayne Jett, *The Path to Destruction of Taft-Hartley Pension Trusts: Mandatory "Defined Benefit Plan" Status, reprinted in The Multiemployer Pension Plan Amendments Act of 1979, Hearing before the House Comm. on Ways and Means*, 96th Cong., 2d Sess. (1980) 49

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-768

MILWAUKEE BREWERY WORKERS' PENSION PLAN,
Petitioner,

v.

JOS. SCHLITZ BREWING COMPANY and
THE STROH BREWERY COMPANY,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

BRIEF FOR RESPONDENTS

Respondents, Jos. Schlitz Brewing Company ("Schlitz") and The Stroh Brewery Company ("Stroh"), respectfully submit this Brief urging the Court to affirm the judgment of the United States Court of Appeals for the Seventh Circuit rendered on August 13, 1993.[1]

---

[1] In 1982, Schlitz was acquired by Stroh. Schlitz was merged into Stroh, which assumed its liabilities to the Petitioner. Stroh is a corporation and is wholly-owned by The Stroh Companies, Inc. Stroh has no subsidiaries to list pursuant to Rule 29.1.

COUNTER-STATEMENT OF THE CASE

This case arises under the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA").[2] In MPPAA, Congress supplemented the task undertaken six years earlier with the passage of the Employee Retirement Income Security Act of 1974 ("ERISA").[3] *See generally Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2271-72 (1993). Together, these legislative enactments help protect the pension promises made by private employers to the nation's workforce. *See* 29 U.S.C. §§ 1001, 1001a.

Before the Court is a narrow issue of statutory interpretation: whether MPPAA authorizes a plan to assess interest against a withdrawing employer for the year in which the withdrawal occurs. In the decision below, the court of appeals disallowed the plan's assessment of interest for the withdrawal year. *Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994, 1004 (7th Cir. 1993), Pet. App. A-17 to -18. Writing for a unanimous panel, Judge Easterbrook expressly approved the earlier opinion of the Fourth Circuit in *Borden, Inc. v. Bakery & Confectionary Union & Indus. Int'l Pension*, 974 F.2d 528 (4th Cir. 1992). By contrast, the Third Circuit has held that it is proper for a plan to assess "first year" interest. *Huber v. Casablanca Indus.*, 916 F.2d 85, 100 (3d Cir. 1990), *cert. dismissed*, 113 S. Ct. 1070 (1993).[4]

---

[2] Pub. L. No. 96-364, 94 Stat. 1209 (1980) (codified as amended at 29 U.S.C. §§ 1381-1461 (1988)). Unless otherwise noted, all citations herein to the United States Code are to the 1988 codification.

[3] Pub. L. No. 93-406, 88 Stat. 832 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461 (1988)). Citations herein to ERISA are to either sections of the Act or to the parallel sections of 29 U.S.C. Parallel citations for each provision appear in the Table of Authorities.

[4] The Third Circuit's position is not entirely clear. In a later case, that court, without issuing an opinion, affirmed a district court decision that permitted interest to accrue only from the date of withdrawal, rather than during the entire year in which the withdrawal occurred. *See Carl Colteryahn Dairy, Inc. v. Western Pennsylvania Teamsters & Employers Pension Fund*, 8 F.3d 810 (3d Cir. 1993), *aff'g Colteryahn Dairy, Inc. v. Western Pennsylvania Teamsters Fund*, 16 Employee Benefits Cas. (BNA) 2100, 2104 (W.D. Pa. 1993).

In their briefs, Petitioner and *amici* have all provided summaries of the statutory scheme.[5] In our view, however, their treatments are unduly narrow and fail to explain the broader context in which MPPAA's withdrawal liability provisions operate. We begin, therefore, with a discussion of the backdrop against which Congress legislated and a review of certain features of ERISA. We then explain how the statute directs withdrawal liability to be computed and collected, using the facts of this case to illustrate.

A. Defined Benefit Pension Plans

Petitioner, the Milwaukee Brewery Workers' Pension Plan ("the Plan"), is a multiemployer plan as defined by § 3(37) of ERISA, 29 U.S.C. § 1002(37). It was established in 1954 and has been maintained pursuant to a series of collective bargaining agreements between the Brewery Workers Local Union No. 9 and the contributing employers. *See* Pet. App. at E-5. The Plan provides retirement benefits to its participants and their beneficiaries based on formulae specified in the plan document. J.A. 97-112. It is funded by employer contributions and investment earnings thereon. All of the Plan's assets are pooled; there are no separate accounts for individuals, participants or employers.

---

[5] *Amicus* briefs on the merits in support of the Petitioner were filed by Central States, Southeast and Southwest Areas Pension Fund ("Central States") and the National Coordinating Committee for Multiemployer Plans ("NCCMP"). Although the United States filed a brief urging the Court to review the issue presented, it did not file a brief on the merits.

Paying benefits at specified levels is typical of "defined benefit" pension plans. In another respect, however, the Plan is similar to a "defined contribution" pension plan—the rate at which each employer must contribute to the Plan is specified in the governing collective bargaining agreement. *See Connolly v. PBGC*, 475 U.S. 211, 232 (1986) (O'Connor, J., concurring) (noting that collectively bargained multiemployer plans "possess the characteristics of both fixed contributions and fixed benefits"). Prior to ERISA, an employer's financial obligation to a multiemployer plan was governed by the collective bargaining agreement, and employers generally had no obligation to contribute anything beyond the amount required by that agreement. *See id.* at 232-33.

ERISA, however, places plans such as this one in the "defined benefit" category. *Compare* 29 U.S.C. § 1002 (34) (an "individual account" or "defined contribution" plan "provides for an individual acount for each participant") *with id.* § 1002(35) (" 'defined benefit plan' means a pension plan other than an individual account plan"). Defined benefit plans, unlike defined contribution plans, are subject to statutory funding rules and to regulation by the Pension Benefit Guaranty Corporation ("PBGC"), as described more fully below.

In a typical defined benefit plan, covered employees earn, or "accrue," their retirement benefits incrementally over a period of years during their active employment. To the extent that an incremental benefit accrues from the current year of service, the plan's liability for that incremental addition is said to be a "normal cost" of the plan. Defined benefit plans often grant credit for years worked prior to the date the plan was established; the liability attributable to such periods is said to be a "past service" or "accrued" liability of the plan. Similarly, plan amendments that increase the level of benefits may impose a "past service" cost if the increased benefits are to be calculated with reference to years of service prior to

adoption of the amendments. *See* Dan McGill & Donald S. Grubbs, Jr., *Fundamentals of Private Pensions* 266-70 (6th ed. 1989) [hereinafter *McGill & Grubbs*].

The monthly benefit formula under a defined benefit plan is known in advance. But the cost of providing the benefit—the amount of money that will be sufficient to satisfy the future benefit obligations—is uncertain. This is because the cost depends upon a number of future events, such as the ages at which participants will actually retire and begin receiving benefits, the investment return that will be earned on the fund's assets, the rate at which participants will drop out of the plan, and the rate at which participants and their beneficiaries will die. Plan administrators retain pension actuaries to estimate plan costs by applying various assumptions concerning these future events. *See generally Wachtell, Lipton, Rosen & Katz v. Commissioner*, 26 F.3d 291, 293-94 (2d Cir. 1994); *Vinson & Elkins v. Commissioner*, 7 F.3d 1235, 1236 (5th Cir. 1993). This process is called an "actuarial valuation" of the plan. As summarized by the Plan's actuary in this case:

> The valuation technique involves a projection of the future amounts that may be payable to each participant, a determination of the probability that each such payment will have to be made, and a computation of the present value of the probable future payments.

J.A. 181. A plan is "underfunded" whenever the present value of its liability for accrued benefits exceeds the current value of its assets.

Although actuarial assumptions are chosen by trained professionals, *Concrete Pipe*, 113 S. Ct. at 2284, they are nevertheless educated guesses. It follows that the amount computed to be the plan's liability, calculated by applying a particular set of assumptions to available data, is itself an estimate. Perhaps for this reason, "actuarial practice has been described as more in the nature of an

'actuarial art' than a science." *Id.* at 2286 (citation omitted). Since an actuary's principal responsibility is to ensure that funds will be available to satisfy pension obligations as they come due, actuaries tend to take a cautious or "conservative" approach in selecting assumptions, particularly when funding is anticipated to continue for a long period of time. *See Vinson & Elkins v. Commissioner*, 99 T.C. 9, 26-27 (1992), *aff'd*, 7 F.3d 1235 (5th Cir. 1993). In other words, actuaries tend to lean towards overstating the plan's liabilities, rather than understating them.

B. Funding Rules Under ERISA

ERISA and the Internal Revenue Code contain complex rules governing the funding of defined benefit pension plans. 29 U.S.C. § 1082; I.R.C. § 412. These "minimum funding standards" apply to both multiemployer plans and single employer plans, although some of the rules differ depending upon the type of plan. *See McGill & Grubbs* at 381. The minimum funding standards help protect the interests of plan participants in assuring that funds will be available to pay promised benefits.

Under the minimum funding rules, each plan is required to maintain a "funding standard account." I.R.C. § 412(b)(1). Each year, the funding standard account must be charged and credited as specified in the statute. *Id.* § 412(b)(2), (3). The "minimum funding contribution" for each year is, in effect, the amount required to eliminate any debit balance in the account that remains after applying the various charges and credits. *Id.* § 412(a). Normal cost must be funded in the year in which it arises and unfunded past service liability is amortized over specified periods of time. *Id.* § 412(b)(2). Employer contributions to multiemployer plans are made in accordance with the terms of the governing collective bargaining agreement. These plans must nevertheless maintain a

funding standard account and satisfy the minimum funding contribution each year.[6] The contribution levels specified in the collective bargaining agreement are designed to ensure that the plan receives no less than the ERISA-prescribed minimum funding contribution in each year that the agreement remains in effect.

The ultimate goal of pension plan funding is to accumulate during each participant's pre-retirement years sufficient assets to fund an annuity payable for the rest of the participant's life and, where the plan so provides, the life of the participant's spouse. *See Vinson & Elkins*, 99 T.C. at 25. But since "imprecision inheres in the choice of actuarial methods and assumptions," *Concrete Pipe*, 113 S. Ct. at 2286, "[o]nly by coincidence will the actual experience of the plan conform to the assumptions that underlie the actuarial cost estimate." *McGill & Grubbs* at 270. The minimum funding standards take this inevitable mismatch between projection and reality into account by providing several mechanisms for self-correction of plan funding.

ERISA requires annual valuations by "enrolled" actuaries. 29 U.S.C. §§ 1023(a)(4)(A), 1082(c)(9); I.R.C. § 412(c)(9). Each such valuation updates the actuary's estimate of liability by incorporating the plan's actual experience since the last valuation. If the actuarial assumptions turn out to have been too conservative (*i.e.* to have overstated the plan's liabilities) when compared with actual experience, the plan is said to have incurred an "actuarial" or "experience" gain. That gain is then amortized over a number of years by reducing the level of future contributions, as provided in § 412(b)(3)(B)(ii) of the Internal Revenue Code. By the same token, if the assumptions were overly opti-

---

[6] The Plan's funding standard account for the 1981 plan year appears at pages 201-203 of the Joint Appendix. It shows that a contribution of at least $8,917,996 was needed to satisfy the minimum funding obligation for the year ending December 31, 1981.

mistic (*i.e.* to have understated liabilities), the plan incurs an "actuarial" or "experience" loss, which is amortized over future years by increasing the level of contributions. *Id.* § 412(b)(2)(B)(iv). If plan experience differs significantly from that assumed over a period of years, the actuary will adjust the assumptions accordingly, and a gain or loss created by a change in assumptions will also be amortized over a period of years. *Id.* § 412 (b)(2)(B)(v), (b)(3)(B)(iii).[7]

C. Title IV of ERISA—Termination Insurance

The withdrawal liability provisions of MPPAA appear in Title IV of ERISA. There Congress created a plan termination insurance program to be administered by the PBGC. 29 U.S.C. § 1302(a); *see generally PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 720 (1984).

In general, under the termination insurance program PBGC collects premiums from the sponsors of covered defined benefit plans and provides insurance coverage to those plans upon the happening of an insured event. *See generally PBGC v. LTV Corp.*, 496 U.S. 633, 636-38 (1990). For single employer plans, the insured event is termination of the plan with insufficient assets to satisfy liabilities. In that event, PBGC pays pension benefits to the plan's participants and beneficiaries up to certain levels. 29 U.S.C. § 1322(a). For multiemployer plans, PBGC is to provide "financial assistance" in the form of loans to insolvent plans. 29 U.S.C. § 1431. PBGC also guarantees certain levels of benefits to participants in insolvent multiemployer plans. 29 U.S.C. § 1322a. PBGC has a claim against the sponsor of an insufficient single employer plan that terminates for the amount of the underfunding. 29 U.S.C. § 1362(b). When a multiemployer plan terminates, liability for all of the plan's

[7] These concepts are illustrated in the Plan's actuarial valuation report for 1981, which appears in the Joint Appendix. *See* J.A. 198-200. *See generally McGill & Grubbs* at 379-85.

underfunding for vested benefits is allocated among the contributing employers. 29 U.S.C. § 1399(c)(1)(D).

The termination insurance provisions of Title IV that are applicable to multiemployer plans were added to the statute in 1980 by MPPAA. As originally drafted in 1974, the statute had the effect of encouraging employers to withdraw from financially troubled multiemployer plans in the hope of avoiding liability for the plan's underfunding. *See generally R.A. Gray & Co.*, 467 U.S. at 720-22. This failing was recognized before mandatory insurance coverage for multiemployer plans became effective, and in 1977 PBGC was instructed by Congress to study the problem and recommend appropriate legislative action. *Id.* at 721. MPPAA emerged in 1980 as the culmination of this study by PBGC and the ensuing legislative process.[8] The statute's legislative history is discussed in greater detail in section II below.

D. Withdrawal Liability Under MPPAA

One of the principal innovations of MPPAA was to make an employer that withdraws from a multiemployer plan liable for a portion of the plan's unfunded vested benefits ("UVB").[9] The statutory scheme discourages

[8] The PBGC, which is responsible for paying benefits to participants in failed plans, has taken the position that MPPAA does *not* authorize the imposition of withdrawal year interest, even though under that interpretation the plan receives less withdrawal liability than it would under the Plan's interpretation. *See Huber*, 916 F.2d at 96-99. We recognize that an agency's litigating position generally is not entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But the fact that PBGC has taken a position against its own interest suggests that it is firmly convinced that the position is correct. The Brief for the United States in support of the Plan's petition for certiorari, which takes the opposing view on the merits, expressly notes that it does not reflect the views of the PBGC. Brief for the United States as Amicus Curiae at 1-2 n.1.

[9] As noted above, a plan is underfunded if its assets are insufficient to satisfy its liability for *accrued* benefits. Withdrawal lia-

employers from withdrawing from an underfunded plan by requiring such an employer to make additional contributions to the plan even though its employees no longer accrue benefits under the plan.

Section 1381 of ERISA establishes withdrawal liability:

> If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

29 U.S.C. § 1381(a).[10] The statute then goes on to define the "withdrawal liability" as an allocable amount of the plan's UVB with certain adjustments:

> For purposes of subsection (a) of this section—
>
> (1) The withdrawal liability of an employer to a plan is the amount determined under section 1391 . . . to be the allocable amount of unfunded vested benefits, adjusted
>
> (A) first, by any de minimis reduction applicable under section 1389 . . . ,
>
> (B) next, in the case of a partial withdrawal, in accordance with section 1386 . . . ,
>
> (C) then, to the extent necessary to reflect the limitation on annual payments under section 1399 . . . , and
>
> (D) finally, in accordance with section 1405 . . . .

bility, however, is based on the amount by which the plan's liability for *vested* benefits exceeds its assets. Vested benefits are accrued benefits that have become "nonforfeitable" under the plan or under ERISA's minimum vesting rules. *See* 29 U.S.C. § 1053.

[10] A complete withdrawal occurs when an employer ceases to have an obligation to contribute to the plan or permanently ceases all covered operations under the plan. 29 U.S.C. § 1383. Partial withdrawals are triggered by either a reduction in the amount of the employer's level of contributions or a partial cessation of covered activities. *Id.* § 1385. A partial withdrawal occurs on the last day of the plan year in which the triggering event occurred. *Id.* § 1385(a).

29 U.S.C. § 1381(b)(1).[11] The responsibility for determining and collecting withdrawal liability rests with the plan sponsor—typically, the plan's trustees.[12] Section 1382 provides:

> When an employer withdraws from a multi-employer plan, the plan sponsor, in accordance with this part, shall—
>
> (1) determine the amount of the employer's withdrawal liability,
>
> (2) notify the employer of the amount of the withdrawal liability, and
>
> (3) collect the amount of the withdrawal liability from the employer.

29 U.S.C. § 1382.

In practice, the calculation of an employer's withdrawal liability consists of eight steps:

Step 1—Determine the plan's total amount of UVB. This determination is to be made as of the last day of the immediately preceding plan year. *E.g.*, 29 U.S.C. § 1391(b)(2)(E)(i).[13] Since ERISA requires a valuation of the plan each year in any event, this calculation

[11] Each of the statute's adjustments *reduces* the "allocable amount of the unfunded vested benefits" as determined under § 1391. Thus, the Plan is mistaken in asserting that "Congress intended that the withdrawing employer be fully responsible for its allocated share of unfunded benefits." Brief for Petitioner at 34 ("Pet. Br."); *see aslo id.* at 37; Brief for the National Coordinating Committee for Multiemployer Plans as Amicus Curiae Supporting Petitioner at 11-12 ("NCCMP Br.").

[12] H.R. Rep. No. 869, pt. 1, at 83. Full citations to the legislative history sources cited herein are provided in Appendix B ("App. B.").

[13] For partial withdrawals triggered by a 70 percent contribution decline, this amount is based on the plan's UVB as of the last day of the second preceding plan year. 29 U.S.C. § 1396(a)(1)(B).

will already be made by the plan's actuary. In this case, the governing actuarial valuation report was issued in June 1981. J.A. 161.[14]

Step 2—Allocate a share of UVB to the withdrawing employer. The employer's share of the plan's UVB is calculated pursuant to § 1391. Congress recognized that more than one methodology could be used to allocate a plan's UVB among the contributing employers. Unless the plan is amended to adopt an alternative method, the so-called "presumptive method" governs this allocation. 29 U.S.C. § 1391(b). The presumptive method allocates the plan's UVB to the employers commensurate with each employer's contribution obligation for a 5-year period. *See generally McGill & Grubbs* at 625-26. Other permissible methods—the "modified presumptive" method, the "rolling five" method and the "direct attribution" method—use different formulae for allocating a plan's UVB among the employers. *Id.* at 626-28. In this case, the amount of UVB allocable to Schlitz under § 1391, calculated using the presumptive method, was $23,300,000. *Schlitz*, 3 F.2d at 1001, Pet. App. at A-11; Pet. App. at F-4.

Step 3—Make certain adjustments to produce the withdrawal liability amount. The adjustments specified in § 1381(b)(1)(A) and (B) are made to the amount determined under § 1391 to be the employer's allocable share of UVB. 29 U.S.C. § 1399(c)(1)(A)(i). The *de minimis* adjustment mandated by subparagraph (A) of § 1381(b)(1) generally provides that an employer's allocable share of UVB is to be forgiven if the amount is immaterial. 29 U.S.C. § 1389. The adjustment required by subparagraph (B) applies only in the event of a partial withdrawal and reduces the amount that would be due

[14] Technically, this Plan is valued as of the *first* day of each plan year—January 1. Accordingly, the withdrawal liability calculations in this case were based on the actuarial valuation for the 1981 plan year, which valued the plan "as of Janury 1, 1981." *Id.*

upon a complete withdrawal. 29 U.S.C. § 1386. Neither of these adjustments was implicated in this case; the amount of the withdrawal liability after Step 3 was still $23,300,000.

Step 4—Determine the annual payment amount. The employer's annual payment is determined in accordance with subparagraph (C) of § 1399(c)(1). This amount is based on the employer's contribution history. It is the product of the employer's "contribution base" for the highest three consecutive plan years during the past ten plan years muitiplied by its "contribution rate"—the highest rate at which the employer was obligated to contribute during the past ten years. 29 U.S.C. § 1399(c)(1)(C)(i). In this case, the annual payment of Schlitz was $3,945,481. Transcript of Proceedings before Arbitrator at 689. It should be noted that the amount of the annual payment is established entirely independently of the amount of the withdrawal liability determined in Steps 1-3.

Step 5—Determine the number of years of annual payments necessary to amortize the withdrawal liability amount. This "amortization period" is to be

> calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent plan year.

29 U.S.C. § 1399(c)(1)(A)(i). The interest rate used in determining the length of the amortization period is the one that was used in the plan's most recent actuarial valuation. 29 U.S.C. § 1399(c)(1)(A)(ii).[15] In this case, the interest rate was 7 percent. *See* Pet. Br. at 17.

[15] In most but not all cases, this will be the same interest rate used in the valuation referred to in Step 1.

Step 6—Cap the number of annual payments at 20. Make any adjustment to the payment schedule required by § 1381(b)(1)(C). That provision cross references § 1399(c)(1)(B):

> In any case in which the amortization period described in subparagraph (A) exceeds 20 years, the employer's liability shall be limited to the first 20 annual payments determined under subparagraph (C).

29 U.S.C. § 1399(c)(1)(B). In other words, any amount of withdrawal liability that remains after twenty annual payments is forgiven.[16] This adjustment did not apply to Schlitz.

Step 7—Create a hypothetical payment schedule. The schedule of annual payments is converted to a schedule of more frequent payments. Section 1391(c)(3) provides:

> Each annual payment determined under paragraph (1)(C) shall be payable in 4 equal installments due quarterly, or at other intervals specified by plan rules.

29 U.S.C. § 1399(c)(3). It is widely accepted that the annual payment amount is converted into quarterly payments by dividing it into four equal amounts, without adding extra interest to the quarterly payments occurring later in the year. *See, e.g.*, PBGC Opinion No. 85-1, 1985 PBGC LEXIS 32 (Jan. 4, 1985); Pet. Br. at 17. This conclusion follows from the statute's direction that the amortization period is to be calculated *as if* each annual payment were made on the first day of each plan year. 29 U.S.C. § 1399(c)(1)(A)(i). The quarterly payments here were $986,370. *See* Pet. Br. at 19.

[16] If applicable, the adjustment specified in subparagraph (D) of § 1381(b)(1) is also made at this point. That provision invokes § 1405, which in essence reduces the liability upon a sale of all or substantially all of the employer's assets or in the case of an insolvent employer undergoing liquidation or dissolution. 29 U.S.C. § 1405.

Step 8—Assign actual due dates to the hypothetical payment schedule. The quarterly payment schedule produced under Step 7 is hypothetical only. Section 1399(c)(1)(A)(i) provides that, while the amortization period is to be calculated *as if* the first payment were made on the first day of the following plan year, "[a]ctual payment shall commence in accordance with paragraph (2)." Thus, the payment schedule produced in Step 7 must be shifted in time so that the first payment coincides with the date on which the statute requires payments to begin —within 60 days after the plan sponsor makes a demand for payment:

> Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) beginning no later than 60 days after the date of the demand . . . .

29 U.S.C. § 1399(c)(2). The employer must begin making payments in accordance with the demand even if it seeks review of the plan sponsor's determination. *Id.*

* * * *

In this case, the Plan issued the demand on September 29, 1981, relatively shortly after Schlitz had withdrawn. J.A. 153-54. The Plan initially computed the amount of the withdrawal liability using an allocation method other than the presumptive method. Under this "direct attribution" method, the amount of the withdrawal liability was $41,031,406. *See* Pet. Br. at 17.[17] The demand letter stated that the Plan had "determined that the amount of liability of Jos. Schlitz Brewing Company as a result of its complete withdrawal from the Milwaukee Brewery Workers' Pension Plan is $41,031,406." J.A. 153. A payment schedule was included, and demand was made "for payment of the stated employer withdrawal liability, $41,031,406, plus interest, in quarterly installments" in

[17] The court below held that allocation under the direct attribution method was erroneous.

accordance with the payment schedule. J.A. 153-54. The payment schedule included interest for the period from December 31, 1980 (the date as of which the Plan's UVB was calculated)[18] to January 1, 1982 (the date the hypothetical payment schedule began). The first payment of $986,370 was due on November 1, 1981. J.A. 155. Schlitz made this and all other required payments on time.[19]

SUMMARY OF ARGUMENT

One of the principal reforms in MPPAA was the requirement that an employer withdrawing from a multiemployer pension plan pay its "fair share" of the plan's unfunded liability for vested benefits. The withdrawal liability provisions of MPPAA and their legislative history indicate that Congress recognized that the determination of the "fair share" is not a simple task and that a variety of factors must be taken into account. At the same time, Congress sought to streamline the procedures for administering the program to encourage the prompt assessment and timely payment of withdrawal liability.

MPPAA was the result of a lengthy legislative process, and it reflects a delicate balancing of interests—those of

[18] As noted above, the valuation date in this case was really January 1, 1981. January 1, 1981 is virtually the equivalent of December 31, 1980, and we use the latter date in an effort to minimize confusion.

[19] Under the initial payment schedule, Schlitz would have been making payments of withdrawal liability into the next century. *See* Pet. Br. at 17. In 1988, however, the arbitrator ruled that the total withdrawal liability due was $23,300,000, instead of $41,031,406 plus withdrawal year interest. As a result, the payment schedule was shortened to the extent that Schlitz had only one payment left. *See id.* at 19. After the district court ordered payment of withdrawal year interest plus prejudgment interest thereon, Schlitz paid an additional $3,424,150 to the Plan. This amount, plus interest, was returned to Schlitz following the decision of the court of appeals. *See id.* at 21-22.

the plan and its participants and those of contributing employers. The legislative history reveals Congress's view that this balancing of interests was necessary to fulfill the statute's "basic" policy: that participants' interests are best protected by "fostering the growth and continuance of multiemployer plans." 126 Cong. Rec., App. B n.12, at 11,992.

Like ERISA, MPPAA is "comprehensive and reticulated,"[20] and the courts need not engage in gap-filling exercises. The statute does not provide for the assessment of withdrawal year interest, and the legislative history indicates that Congress did not intend to require such interest to be paid. When Congress acts with the care evident in this statutory scheme, it is dangerous to infer additional provisions based on the assumption that Congress "simply forgot" to include them expressly.[21]

Nor does the omission of withdrawal year interest result in a statutory scheme that is unfair or incomplete. A number of assumptions and predictions are necessary to determine the amount of withdrawal liability. To the extent there is a "gap" between the time contributions cease and the time interest begins to accrue, it is likely to be only a few months. Other aspects of the statutory scheme more than offset the effect of such a "gap." If anything, the statute is unduly burdensome to withdrawing employers. There is no reason to resolve any doubts by imposing more onerous liability in the form of an extra year of interest.

[20] *See Mertens v. Hewitt Assocs.*, 113 S. Ct. 2063, 2066 (1993); *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980).

[21] *See Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985).

ARGUMENT

I. THE STATUTE DOES NOT AUTHORIZE THE ASSESSMENT OF WITHDRAWAL YEAR INTEREST

Withdrawal liability is wholly a creature of statute. It gave underfunded multiemployer plans something they did not have before—the assurance that an employer that ceased participating in the plan as a contributing employer would continue to make payments toward satisfying a portion of the plan's underfunding. *R.A. Gray & Co.*, 467 U.S. at 723 n.3. The withdrawal liability provisions evidence a careful balancing of the interests of the plan and the interests of contributing employers. They should be applied as written.

A. The Statute Does Not Explicitly Authorize the Assessment of Withdrawal Year Interest

MPPAA expressly provides for the accrual of interest in two situations. If a scheduled payment is late or if the employer defaults, interest is charged; in each such situation, the statute specifies the date from which interest accrues:

> If a payment is not made when due, *interest* on the payment *shall accrue from the due date until the date on which the payment is made.*

29 U.S.C. § 1399(c)(3) (emphasis added). Similarly,

> In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, *plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. . . .*

29 U.S.C. § 1399(c)(5) (emphasis added). The statute also provides guidance as to the appropriate interest rate:

> Except as provided in paragraph (1)(A)(ii), interest under this subsection shall be charged at rates based on prevailing market rates for comparable obligations, in accordance with regulations prescribed by [PBGC].

29 U.S.C. § 1399(c)(6).

The foregoing statutory language clearly provides for the assessment of interest on withdrawal liability payments that are not made when due. In the event of default, interest is to be assessed on the total outstanding liability from the date that the first payment was missed. In these situations, interest is to be based on market rates set by PBGC. These interest liabilities create strong incentives for employers to pay their obligations under the statute in a timely manner. Neither of these sections requires interest to be paid in the event that payments are timely made.

B. Use of the Word "Amortize" in the Statute Does Not Require the Addition of Withdrawal Year Interest

The only textually-based arguments made by Petitioner and *amici* to support the imposition of withdrawal year interest rely on the statute's direction to "amortize" the amount of the liability "in level annual payments . . ., calculated as if the first payment were made on the first day" of the plan year following withdrawal. *See* Pet. Br. at 24-25; Central States Br. at 12-13; NCCMP Br. at 8-9. Those arguments lack merit and should be rejected.

Use of the word "amortize" in the statute implies nothing about *when* interest begins to accrue. It does, however, together with two other provisions, suggest that an interest factor is used in computing the amortization period:

- Subparagraph (1)(A)(i) of § 1399(c) provides that the schedule of payments is to extend for a number of years adequate to "amortize" the withdrawal liability, calculated as if payments began

on the first day of the plan year following withdrawal and continued to be made on the first day of each subsequent plan year. 29 U.S.C. § 1399 (c)(1)(A)(i).

- Subparagraph (1)(A)(ii) requires that the determination of this amortization period be "based on the assumptions used for the most recent actuarial valuation for the plan." 29 U.S.C. § 1399(c)(1)(A)(ii).
- Paragraph (6) of § 1399(c) provides that interest under subsection (c) is to be charged at prevailing market rates, "[e]xcept as provided in paragraph (1)(A)(ii)." 29 U.S.C. § 1399(c)(6).

Taken together, these provisions suggest that the payment schedule should be calculated to reflect a factor for interest on the unpaid withdrawal liability and that the interest rate used for this purpose should be based on the plan's recent actuarial assumptions. Certainly, it is customary (if not mandatory) for an amortization calculation to include an interest component, and the plan's most recent valuation will necessarily require the actuary to make interest rate assumptions.

Thus, Petitioner's arguments about the dictionary definition of "amortize" are beside the point. Respondents do not dispute the use of an interest factor in calculating the schedule of payments under the statute.[22] The question in this case is not whether interest ever accrues—it obviously does—but whether interest is assessed for the year in which withdrawal occurs. A dictionary is of no use in resolving this question.

---

[22] Accordingly, in this case at the end of the payment schedule Schlitz had made aggregate payments totalling $28,498,691—the amount necessary to amortize $23,300,000 in annual payments of $3,945,481 using a 7 percent interest factor.

C. The "Withdrawal Liability," as Defined in the Statute, Does Not Include Withdrawal Year Interest

In § 1399(b)(1), the plan sponsor is directed to inform a withdrawing employer of "the amount of the liability" and "the schedule for liability payments." 29 U.S.C. § 1399(b)(1)(A). The statute thus distinguishes between these two concepts—"the amount of the liability" and "the schedule for liability payments." As we have just seen, the schedule for liability payments includes interest at the plan's actuarial rate. In this section, we explain that the amount of the liability does not.

For all its complexity, the statute defines "withdrawal liability" in a straightforward manner. It is "the amount determined under section 1391 . . . to be the allocable amount of unfunded vested benefits," with four specified adjustments. 29 U.S.C. § 1381(b)(1). At this stage of the litigation, it has been determined that the allocable amount of the Plan's UVB under § 1391 was $23,300,000. *See* Pet. Br. at 24 n.17. It is also undisputed that none of the adjustments listed in § 1381(b)(1) applied. *Id.* at 15 n.12. Thus, the "withdrawal liability" as defined by § 1381(b)(1) was $23,300,000.[23] The dispute between the parties concerns whether interest for the withdrawal year is to be added to that amount and amortized by the scheduled payments.

According to § 1399(c)(1)(A)(i), the amount to be amortized is the amount of the "withdrawal liability" before making the adjustments called for by § 1381 (b)(1)(C) and (D). Section 1399(c)(1)(A)(i) provides:

---

[23] Petitioner concedes this, albeit somewhat obliquely. According to Petitioner, "Schlitz' withdrawal liability, as defined in section [1381](b) and as originally calculated by the Plan's actuary, was $41,031,406." *Id.* at 15-16 n.12. Petitioner refers to the actuary's original calculation, in which the direct attribution allocation method was used erroneously. The parallel amount computed under the presumptive method was $23,300,000.

> [A]n employer shall pay the amount determined under section 1391 . . . adjusted if appropriate under section 1389 . . . [the *de minimis* adjustment required by § 1381(b)(1)(A)] and then under section 1386 . . . [in the case of a partial withdrawal as directed by § 1381(b)(1)(B)] over the period of years necessary to amortize the amount in level annual payments . . . .

29 U.S.C. § 1399(c)(1)(A)(i).[24] Once again, since neither of these adjustments applied in this case, the amount to be amortized by Schlitz was $23,300,000.

Thus, Schlitz takes the position that the principal balance of "the amount of the liability" as of the hypothetical first payment date—January 1, 1982—was $23,300,000. It follows that the principal balance on the *actual* first payment date—November 1, 1981—was also $23,300,000, since the actual payment schedule is simply the hypothetical payment schedule shifted in time.

The Plan and *amici* disagree, however. The Plan asserts that the principal balance as of January 1, 1982—the hypothetical first payment date—was $24,931,000 instead of $23,300,000. Pet. Br. at 28. The difference of $1,631,000 (7 percent of $23,300,000) is attributable to accrued interest at 7 percent from December 31, 1980 (the valuation date) through December 31, 1981. *Id.* The Plan appears to be suggesting that the starting principal balance is $23,300,000, but that the hypothetical payment schedule begins on the valuation date—December 31, 1980—even though payments are not presumed to begin until January 1, 1982, one year later. *Amicus* NCCMP makes a similar point—in its view, the "first period" in the payment schedule runs from the valuation date (December 31, 1980) to the hypothetical first payment date (January 1, 1982). *See* NCCMP Br. at 8-9.[25]

Amicus Central States arrives at the same result as the Plan using a different approach. Like Schlitz, it would begin the hypothetical payment schedule on January 1, 1982, but "the beginning principal balance" on that date would include an adjustment that is the equivalent of the addition of interest for one year. Under the approach taken by Central States, the "beginning principal balance —the withdrawal liability" in this case was $23,300,000, plus the equivalent of interest for one year at 7 percent ($1,631,000). *See* Central States Br. at 11-12.[26] Cen-

[24] Section 1399(c)(1)(A)(i) begins with an introductory phrase that lists exceptions to the general rule. "Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraphs (4) and (5)," the rule is as stated in text. Subparagraph (B), which we have already discussed, caps the number of annual payments at 20. Subparagraph (D) eliminates the 20-year cap in instances of a "mass withdrawal" of employers or termination of the plan. Paragraphs (4) and (5) provide for prepayment by the employer and acceleration by the plan, respectively. Those provisions are discussed separately.

[25] NCCMP states that "for purposes of establishing the amortization schedule, the statute *deems* the first payment to occur at the end of the first period, and interest, pursuant to standard amortization practices, begins to accrue from the beginning of such period, *i.e.*, the date as of which the outstanding balance on the liability was calculated." *Id.* at 9. In our view, however, the "first period" of the hypothetical amortization schedule is not the period between the valuation date and the presumed first payment date. It is instead the period from "the first day of the plan year following the plan year in which the withdrawal occurs," 29 U.S.C. § 1399(c)(1)(A)(i), until the first day of the subsequent plan year—in this case from January 1, 1982 to January 1, 1983. The first period of the *actual* payment schedule under our reading of the statute was from November 1, 1981 to November 1, 1982. In the Third Circuit's parlance, we view the statute as creating an "annuity-due," rather than an "immediate annuity." *See Huber*, 916 F.2d at 98.

[26] Central States's explanation for its approach is not convincing. It asserts, "Withdrawal liability is defined as the end result of a series of adjustments to the employer's UVB share, *including ad-*

tral States says that the addition to the $23,300,000 figure is not really interest; it is rather a "discount adjustment" made to reflect the time value of money. Central States Br. at 11. The result is the same, however, as Central States acknowledges. *See id.* at 13.

In effect, Petitioner and *amici* would add a step to the calculation process described in our counter-statement of the case. After making the adjustments prescribed in § 1381(b)(1)(A) and (B) (Step 3) and determining the amount of the annual payment (Step 4), they would either add interest for the withdrawal year or reverse the "excess discount." Nothing in the statute authorizes this additional step. Under either approach, Schlitz would have amortized not $23,300,000 but $24,931,000 between the first and the last payments of the payment schedule. This is because the hypothetical payment schedule is shifted so that the *actual* first payment was due on November 1, 1981, and the principal amount of the liability at that time would have been $24,931,000 under the approaches of the Plan and *amici*.

D. Assessment of Withdrawal Year Interest Requires a Strained and Illogical Reading of the Statutory Language

The positions of the Plan and *amicus* NCCMP suffer from an additional flaw: they assume Congress provided for interest to accrue on a liability that had not yet matured. Congress could have legislated that result, but it is unlikely that it did. As the court of appeals noted, "Schlitz was not liable for one penny until it withdrew from the Plan and received a notice of liability." 3 F.2d at 1004, Pet. App. at A-17. The statute states that

justments to the payment schedule." Id. at 12 n.10 (emphasis added). But the only "adjustment[] to the payment schedule" authorized in § 1381(b)(1), which defines "withdrawal liability," is to cap the number of annual payments at 20. 29 U.S.C. §§ 1381(b)(1)(C), 1399(c)(1)(B).

"[w]ithdrawal liability shall be payable . . . beginning no later than 60 days after the date of the demand." 29 U.S.C. § 1399(c)(2). Before Schlitz withdrew from the Plan, it made all contributions required of it; after it withdrew, it made all payments of withdrawal liability on time. It seems quite anomalous that Schlitz should have incurred an additional interest liability of $1,631,000 even though it fully and timely complied with all of its payment obligations.

That Schlitz should be charged withdrawal year interest is also inconsistent with the statute's prepayment rule. Section 1399(c)(4) provides:

> The employer shall be entitled to prepay the outstanding amount of the unpaid annual withdrawal liability payments determined under paragraph (1)(C), plus accrued interest, *if any*, in whole or in part, without penalty. . . .

29 U.S.C. § 1399(c)(4) (emphasis added). The "if any" language here indicates that there will be instances in which no interest will have accrued at the time of prepayment. Realistically, this could happen only if the principal balance at the time payments commence does *not* include "accrued interest" and the employer pays off the entire amount on the day its first payment is due. The positions of Petitioner and *amicus* NCCMP render the "if any" language meaningless.[27] If interest for the

[27] In an effort to find some reason for the "if any" qualification without denying withdrawal year interest, the *Huber* court speculated as follows: "The employer may pre-pay the outstanding principal amount of the withdrawal liability at any time during the amortization period, including at a point immediately after a scheduled payment, at which point all accrued interest has been paid." 916 F.2d at 99. This scenario is artificial and strained. It assumes that an employer would make a scheduled payment and then on the same day pay off the balance. It further assumes that such payments made at the same time would be treated as two separate payments—one including principal and interest and one of principal only.

withdrawal year is always added, there could never be a prepayment *without* accrued interest.

The record in this case illustrates this point. In the demand letter to Schlitz, the Plan stated, "the amount of liability . . . is $41,031,406 [$23,300,000 under the presumptive method]." J.A. 153.[28] This amount does not include withdrawal year interest. The Plan's actuarial expert testified that, if the liability had been paid in its entirety on the day the first payment was due, the amount would have been "the forty-one million without interest, without any other interest other than what was involved in developing the forty-one million in the first place." Transcript of Proceedings before Arbitrator at 811-12 (Levy). Indeed, Mr. Levy testified, "I don't think the statute refers to interest accruing on forty-one million." *Id.* at 813. We believe the Plan's expert was correct on this point. Nothing in the statute authorizes plans to "gross up" the § 1391 amount by adding withdrawal year interest.

Nor, contrary to the assertions of Petitioner and *amicus* NCCMP, does our "interpretation" fail to give effect to every part of the statute. *See* Pet. Br. at 37-39; NCCMP Br. at 11. According to this argument, the hypothetical payment schedule called for in § 1399(c)(1)(A)(i) serves no purpose unless withdrawal year interest is assessed. But it serves an important purpose under our reading of the statutory scheme: it enables the plan to establish a hypothetical quarterly payment schedule for every employer as soon as the prior year's actuarial valuation is complete. The plan can readily prepare an actual payment schedule by simply adjusting the payment dates to begin within 60 days after demand. This helps

[28] It will be recalled that the withdrawal liability of Schlitz, as originally calculated under the wrong allocation method, was approximately $41,000,000. This is the same as the $23,300,000 amount calculated under the proper allocation method.

ensure that the period during which the employer is not making payments to the plan is as brief as possible.

The significance of the provision lies in its creation of a hypothetical payment schedule and not in the date on which the hypothetical schedule begins. Congress could have chosen any date as the beginning point for constructing the hypothetical payment schedule; it chose the first day of the plan year following withdrawal.[29]

In summary, if the statute is applied as written, the amount of the liability to be satisfied during the amortization period in this case was $23,300,000. The amortization period began on November 1, 1981, the date on which the first payment was due from Schlitz. Neither the addition of withdrawal year interest nor an "excess discount adjustment" is authorized by the statute.

II. THE LEGISLATIVE HISTORY CONFIRMS THAT THE STATUTE DOES NOT AUTHORIZE THE ASSESSMENT OF WITHDRAWAL YEAR INTEREST

MPPAA was the product of extensive study and interaction between Congress and the PBGC. Congress recognized that the statutory provisions of ERISA as enacted in 1974 might not be adequate to deal with the particular problems of multiemployer plans. PBGC was formally requested to study the problems of multiemployer plans and make recommendations. *See* S. Rep. No. 570, 95th Cong., 1st Sess. 1-4, *reprinted in* 1977 U.S.C.C.A.N. 4128, 4128-31. This PBGC study was transmitted to Congress in June 1978. In May 1979, the Administration formally submitted legislation recommended by PBGC, which was introduced in identical bills in both houses of Congress. App. B nn.1, 2.

The PBGC-authored bills were subject to hearings and modifications by four congressional committees during

[29] The fact that a statutory provision could have been written in a different way with the same effect is not unusual or surprising. This situation is distinct from one where an interpretation renders a statutory provision meaningless.

1979 and 1980, with final enactment in September 1980. Appendix B to this brief sets forth the legislative history of MPPAA in greater detail.

A. The Legislative Purpose Does Not Require the Statute to Be Interpreted So as to Maximize the Amount of Withdrawal Liability

At the outset, we should deal with the argument that MPPAA was intended to benefit plans and their beneficiaries, and thus that the interest question should be resolved so as to maximize liability. Pet. Br. at 23, 32, 40. This is the sort of argument that gives resort to legislative history a bad name. This Court has repeatedly warned that it is not proper to assume that a statute has such monolithic effect.

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (*per curiam*); *LTV Corp.*, 496 U.S. at 646-47 (same quotation); *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986).

Statutes generally serve a variety of purposes and are often the product of legislative compromise. This is certainly the case for MPPAA. In fact, the House Committee on Education and Labor made this very point: "The bill as reported out by the committee represents an effort to strike an appropriate balance among conflicting interests and needs." H.R. Rep. No. 869, pt. 1, at 63. According to one of the bill's Senate sponsors, "in order to develop a consensus in support of the legislation, it was necessary to make compromises. I doubt that any one group that had an impact on this legislation

is pleased with all of it." 126 Cong. Rec., App. B n.13, at 20,178 (statement of Sen. Javits); *see also id.* at 20,185 (statement of Sen. Long).

The legislative history of MPPAA is replete with evidence that the legislation was designed to serve a variety of purposes. One purpose was to deter withdrawals and enhance the financial security of plans when withdrawals occur. *See, e.g.*, H.R. Rep. No. 869, pt. 1, at 65. This purpose would be served by any interpretation that maximizes the amount of money paid by a withdrawing employer.

But the basic policy behind the legislation, stated time and again, was Congress's realization that "the retirement income security of multiemployer plan participants is best assured by fostering the growth and continuance of multiemployer plans." 126 Cong. Rec., App. B n.12, at 11,992; *see also, e.g.*, H.R. Rep. No. 869, pt. 1, at 51; H.R. Rep. No. 869, pt. 2, at 4. This policy would be frustrated if the withdrawal liability imposed on employers was too harsh. New employers would be reluctant to enter multiemployer plans, and employers contributing to healthy plans would have an incentive to leave rather than risk incurring a substantial liability later. *See* 126 Cong. Rec., App. B n.13, at 20,181 (statement of Sen. Dole) (protecting employers is not inconsistent with the interests of employees, since such measures reduce the likelihood of plan termination).

Among the purposes of the legislation, designed to implement its basic policy, were (1) to be equitable; (2) to limit the financial burden imposed on withdrawing employers; and (3) to encourage new employers to join plans.[30] Another strand that runs through the legislative

---

[30] *See, e.g.*, 126 Cong. Rec., App. B n.15, at 23,284 (statement of Sen. Dole) (noting that burden of withdrawal liability on employers might be "too great to bear"); 126 Cong. Rec., App. B n.13, at 20,178 (statement of Sen. Javits) ("employer relief" provisions were added to "impose withdrawal liability in an equitable and feasible

history is the desire to simplify the procedures for calculating and promptly collecting withdrawal liability payments.[31] Imposing additional liability on withdrawing employers does not necessarily serve this purpose.

B. The Drafting History Demonstrates That No Provision of the Statute Was Adopted with the Intent or Effect of Requiring Withdrawal Year Interest

As enacted by Congress, MPPAA included the key features of the original bills that were drafted by the PBGC. However, the legislative process caused a number of changes to be made. This drafting history confirms that Congress did not intend to require withdrawal year interest.

The legislative history also reflects significant opposition to the concept of imposing withdrawal liability and the need for proponents of the legislation to compromise by agreeing to provisions that substantially limited the amount of liability that would be imposed.[32] Thus, it cannot be assumed that all changes made during the legislative consideration of this bill were designed to increase the amount of withdrawal liability. Indeed, the contrary assumption seems more likely to be warranted: that most changes were made in order to placate concerns about excessive liability and thus were designed to reduce the amount that a withdrawing employer would have to pay.

---

manner"); H.R. Rep. No. 869, pt. 2, at 15 (committee intends that withdrawal liability rules not deter new employers from entering a multiemployer plan).

[31] *E.g.*, H.R. Rep. No. 869, pt. 2, at 3; 126 Cong. Rec., App. B n.12, at 11,998 (statement of Rep. Rostenkowski); 126 Cong. Rec., App. B n.14, at 23,039, 23,041 (statement of Rep. Thompson).

[32] *See, e.g.*, 126 Cong. Rec., App. B n.13, at 20,177 (statement of Sen. Williams) (noting that relief was provided to withdrawing employers in order to "balance the needs of employers and the plan"); 126 Cong. Rec., App. B n.14, at 23,004 (statement of Rep. Thompson).

1. *The Original PBGC Proposal*

As originally introduced in the House and Senate, these bills provided a relatively simple scheme:

- A withdrawing employer would be responsible for an allocated share of the unfunded vested benefits of the plan determined as of the most recent plan year ending before the date of withdrawal. S. 1076, § 4201(d).
- The employer was required to pay this amount of withdrawal liability, plus accrued interest at market rates from the date of withdrawal. *Id.* § 4201 (a)(1), (e)(5).
- The withdrawal liability, plus accrued interest, could be paid in amounts equal to the prior level of contributions or in the amount necessary to fully amortize the liability over a period of 15 years, whichever is greater. *Id.* § 4201(e)(2).

App. B n.2.

These provisions for withdrawal liability were subject to a great deal of controversy and modification during the legislative process. The original PBGC proposal and all of the subsequent versions of the bill contained "gaps"—as Petitioner and *amici* use that term—in plan funding. The only text providing for the accrual of any withdrawal year interest was contained in the original PBGC proposal, which stated that interest would accrue from the date of withdrawal. That text was eliminated in the first mark-up.

2. *The Initial Mark-up*

The first mark-up of this legislation occurred in the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor on December 13, 1979. *See* App. B n.8. At this point, a number of changes were made in the original bill regarding the procedures for calculating and paying withdrawal liability.

- Several alternative methods for determining the amount of the withdrawing employer's share of unfunded vested benefits were provided. Under the presumptive method, the employer's liability could not be calculated until the valuation was completed for the end of the plan year in which withdrawal occurred. Other methods used the valuation at the end of the plan year prior to withdrawal. H.R. 3904, § 4201(e), (f), (g).
- The requirement that interest accrue from the date of withdrawal was deleted. The only explicit references to interest were contained in provisions that were made for interest to accrue at market rates in the event that a payment is not made when due or in case of a default. *Id.* § 4201(i)(3), (4), (5), (7).
- The prepayment provision was amended to insert the words "if any" following the reference to "accrued interest." *Id.* § 4201(i)(6).
- The schedule of payments for the withdrawal liability was to be made up as if each annual payment were made at the *end* of the year in which due, with the determination of the amortization period based upon the assumptions used in the plan's most recent actuarial valuation. *Id.* § 4201(i)(2)(A).
- The employer's annual payments were to be based on the prior level of plan contributions and capped at 30 years even if a longer period would be necessary to fully amortize the liability. *Id.* § 4201(i)(2)(A), (B).
- The actual payment schedule would not start on the date of the hypothetical annual payment schedule as provided above, but by converting it to four equal quarterly payments due beginning 60 days after the demand for payment is made. *Id.* § 4201(i)(3).

Most of the foregoing changes survived into the final version of the bill as enacted. Because the statute traces many of its provisions on interest to this mark-up, we have reproduced in Appendix A a comparison of the pertinent provisions of the original bill, as amended during this mark-up, and as enacted.

Following the subcommittee mark-up, the staff of the Joint Committee on Taxation prepared a description of the bill, as amended, for use by the House Committee on Ways and Means at a hearing held on February 19, 1980. This staff analysis contains a description of the liability payment provisions described above. Included in this analysis is the following illustration:

> For example, assume that an employer's withdrawal liability is $1 million and that the plan's valuation rate of interest is 6 percent. Assume that [the statutory formula requires an annual payment] of $63,750. This would result in an amortization of the liability over approximately 49 years. Because the 49-year schedule is longer than 30 years, the employer would be liable to the plan for 30 annual payments of $63,750.

Ways & Means Hearing, App. B n.5, at 21 (Feb. 19, 1980). Although nowhere explained in the staff report, it turns out that this illustration must have been calculated with the first of the 49 annual payments including a year of interest at 6 percent. This was not surprising, since the subcommittee mark-up language that was the basis for this illustration provided for calculating the schedule as if each annual payment was made at the *end* of the year when due.[33] Thus, the first year in

[33] In other words, it takes 48 annual payments of $63,750 paid at the end of each year, plus a final payment of about $40,000 at the end of the 49th year, to amortize $1 million at 6 percent. If the payments are made at the *beginning* of each year, however, it takes less than 38 annual payments of $63,750 to amortize $1 million at 6 percent. *See* NCCMP Br. at 10-11 n.9. Forty-nine such

which interest accrued was not the withdrawal year but the following year.

3. *Subsequent Changes and Final Enactment*

H.R. 3904 was reported by the Education and Labor Committee on April 2, 1980, and by the Ways and Means Committee on April 23, 1980. *See* App. B nn.9, 10. As reported by both committees, the provisions of this bill relating to the calculation and payment of withdrawal liability were very close to the subcommittee mark-up. One important difference was as follows:

> • Instead of being calculated as if each payment were made at the end of the year when due, the hypothetical schedule is to be calculated as if payment were made on the first day of the plan year following withdrawal and each subsequent payment on the first day of each subsequent plan year. H.R. 3904, § 4201(i)(2)(A)(i).

H.R. Rep. No. 869, pt. 1, at 15. Notwithstanding this change in the assumed payment date from the end of the year to the beginning of the year, the illustration quoted above from the Joint Tax Committee staff report was reproduced in the two committee reports without alteration. *Id.* at 83; H.R. Rep. No. 869, pt. 2, at 27-28.

Following floor debates on May 21 and 22, H.R. 3904 was passed by the House on May 22 without further amendment in the provisions at issue here. *See* App. B n.12.

On the Senate side, the companion bill was reported jointly by the Labor and Human Resources Committee and the Finance Committee with amendments on July 24, 1980, and passed by the Senate on July 29 as an amendment in the nature of a substitute for H.R. 3904. *See* App. B nn.11, 13. There was no formal committee

---

payments, if paid at the beginning of each year, would amortize about $1,060,000 ($1 million plus one year of interest at 6 percent).

report on the Senate side, but a joint explanatory statement of the sponsors was entered into the Congressional Record as part of the debates. App. B n.11. Again, the illustration developed by the Joint Tax Committee staff was picked up without significant change. 126 Cong. Rec., App. B n.11, at 20,197 (Joint Explanation of S. 1076). With regard to the method of payment, the only major differences between the House and Senate versions at this point were that the Senate bill had a formula for calculating the amount of the annual payment that was more favorable to the withdrawing employer and the period over which payments were to be capped was shorter (20 years). S. 1076, § 4219(c)(1)(B), (C).

Thereafter, the Senate and House each passed slightly different versions of the bill with additional amendments. *See* App. B nn.14, 15. Significantly for our purposes, the version passed by the House on August 25, 1980, provided that the allocation of unfunded vested benefits under the presumptive method would be made as of the plan year ending *prior* to the year of withdrawal instead of the plan year ending *after* withdrawal. H.R. 3904, § 4211(b). The House accepted the Senate's 20-year cap on the payment schedule but insisted on its own, more onerous formula for determining the amount of the annual payment. H.R. 3904, § 4219(c)(1)(B), (C). The Senate ultimately accepted these revisions, although a conference committee was convened and reported briefly on a few unrelated issues. *See* App. B n.18. The conference committee report was accepted in both houses, and the bill was signed into law by President Carter on September 26, 1980. App. B nn.19-21.

4. *Summary of the Impact of Drafting Changes on Interest Accrual*

At each stage of the drafting process, the impact of the resulting language on interest accrual can be determined, as summarized below. This history confirms that no changes were made with either the intent or the effect

of imposing interest on the withdrawing employer for the year in which withdrawal occurs.

The original PBGC-authored bill.—This language quite explicitly provided that withdrawal liability was calculated as of the end of the plan year before withdrawal, and that interest would accrue at market rates from the date of withdrawal until the first payment was actually made, and thereafter on the remaining balance until paid. Result: first payment necessarily includes some withdrawal year interest, with the actual amount depending upon when the withdrawal occurs and how long it takes the plan to calculate the employer's share of UVB and demand payment.

The initial mark-up.—This version provided that withdrawal liability would be calculated either at the end of the plan year prior to the year of withdrawal (all methods except the presumptive method) or at the end of the plan year during which withdrawal occurred (the presumptive method) and that interest would accrue at the actuarial rate from the first day of the plan year beginning after withdrawal until the presumed date of the first annual payment at the end of that year. Result: first year's payments include one year of interest. However, none of this is withdrawal year interest because the presumed first payment date is the *end* of the plan year *after* the year in which withdrawal occurs.

The bill as reported on the floor and initially passed in both houses.—These versions were identical on the relevant points to the initial mark-up version, except that the first annual payment was presumed to be made on the *first* day of the plan year after withdrawal. The House and Senate differed only on the formula for determining the amount of the annual payments and the number of years of the payment cap. Result: first year's payments include no interest.

The statute as finally enacted.—This language was identical to prior versions in all material respects, except that

under the presumptive method, the valuation date for determining the amount of UVB was moved to the end of the plan year *prior* to withdrawal. Result: first year's payments include no interest. The change in the valuation date for the presumptive method makes no change in the provisions governing accrual and payment of interest as part of preparing the schedule of payments.

C. Petitioner's Reading of the Legislative History Is Incorrect

Based on the foregoing analysis, we can see that the legislative history arguments made by Petitioner are erroneous. The committee reports' illustration of how liability is to be calculated is not consistent with Petitioner's position (Pet. Br. at 40 n.22) because it was prepared for a version of the bill that included a year of interest in the first presumed payment, but it was a year of interest beginning *after* the year in which withdrawal occurred. Once the bill was changed to make the presumed first payment occur at the beginning of that year, the statutory basis for including a year of interest in the first payment was eliminated. Thus this illustration from the legislative history supports Respondents' interpretation of the statute and is inconsistent with Petitioner's position.[34]

---

[34] As applied to the version of the statute reported to the floor of the House and Senate, the illustration also makes no sense. In those versions, the presumptive method provides for UVB to be measured as of the end of the plan year in which withdrawal occurs. If the first payment is presumed to be made on the first day of the following year, there should be at most one day of interest, not one year.

It is understandable that the committees reporting this bill did not change this illustration when the bill language changed, because it was included in the report to illustrate how the 30-year or 20-year payment cap would operate, not to illustrate the date on which interest would begin to accrue. Moreover, the example was not originally prepared by the staff of the committees reporting this legislation but by the staff of the Joint Committee on Taxation. It is not apparent on the face of the example that first-year interest was included in calculating the amortization schedule.

Petitioner's argument that Congress considered and rejected the idea of limiting interest to the period after withdrawal (Pet. Br. at 40-41) is also based on an incomplete understanding of the legislative history. There was never any conflict between the Senate and the House on the provisions that are relevant to this issue. The bills introduced in each house were identical. Identical changes in the statutory language that governs this issue were made in each body at the same stage of the legislative process. Although there were other differences that had to be worked out between the two bodies, there is no evidence of conflict regarding the accrual and payment of interest.

It is true that Congress eliminated the provision in the original PBGC bill that provided for interest to accrue from the date of withdrawal. This does not mean that Congress wanted interest to accrue *before* the date of withdrawal. At the time the PBGC language was eliminated, the effect was to make interest begin to accrue at the beginning of the plan year *after* withdrawal. This is confirmed by the staff illustration prepared at that time. Thereafter, no changes were made in the legislative language that can be identified as having either the intent or effect of moving the interest accrual date to start prior to withdrawal.

Under the versions of the bill after the initial markup and as initially passed by the House and Senate, the valuation date under the presumptive allocation method was the end of the plan year after withdrawal. Because the effect of this change from the PBGC bill was to eliminate the "gap" between the valuation date and the date on which interest begins to accrue, Petitioner suggests that Congress did not need to address the question of interest for any "gap" period. This may be true, but when the valuation date was moved back to the end of the prior plan year, the "gap" was reintroduced, and Congress made no change in the legislative language to provide for interest to be charged for the "gap" period.

Moreover, even under the earlier versions, a "gap" existed. In the original PBGC bills, there was an interest "gap" between the valuation date and the withdrawal date. In subsequent versions of the bill, the alternative (non-presumptive) methods for allocating UVB employed as their last valuation date the end of the plan year *prior* to withdrawal. Since, as Petitioner concedes and as described above, these versions provided for interest to accrue at the beginning of the plan year *after* withdrawal, there would remain a "gap" period. Thus, at every stage of the legislative process, the bill under consideration included a potential "gap." There is no indication that Congress ever adopted changes in the legislative language with the intent or effect of eliminating such "gaps."

D. The Legislative History Demonstrates That Withdrawal Year Interest Is Not Required

It seems reasonably clear from the foregoing drafting history that Congress was concerned that the original PBGC bill could cause excessive amounts of liability to be imposed on withdrawing employers. Although most of the legislative attention was focused on the formula for calculating the annual payment amount and capping the number of such payments, there was also an awareness that interest charges under the original PBGC bill could have been excessive. *See Ways & Means Hearing*, App. B n.4, at 15 (statement of Richard H. Fay).

The changes in the interest rate and accrual generally served to reduce the amount of interest liability for withdrawing employers who paid their obligations on a timely basis. These changes also simplified the task of calculating the amount of payments and gave plans the ability and incentive to promptly demand and collect these payments. The legislative history confirms that Congress was very concerned that withdrawal liability payments begin promptly. *See* 126 Cong. Rec., App. B n.14, at 23,039 (statement of Rep. Thompson). These concerns fully explain the reasons behind the drafting changes that were made.

In particular, the change in the valuation date under the presumptive method in the final version of the bill was most likely made in order to speed up the ability of plans to assess and collect withdrawal liability payments. Under the version initially passed in both houses, plans using the presumptive method would have to wait until after receiving the valuation prepared as of the end of the plan year in which withdrawal occurred.[35] This requirement would cause 6 to 18 months of delay in assessing the withdrawal liability, depending upon how early or late in the year the withdrawal occurred. By moving the valuation date to the end of the prior year, the statute as enacted reduced the time necessary to assess and collect from the withdrawing employer by a year in most cases. There is no indication that Congress thought this change of valuation date required the imposition of an additional year of interest liability on the withdrawing employer.

The foregoing account of the drafting history and the reasons for the changes thus supports our view that none of the language of the statute was adopted with either the intent or the effect of imposing interest liability for the year in which withdrawal occurs.

III. THE STATUTORY SCHEME DOES NOT RESULT IN AN UNFAIR "GAP"

Petitioner asserts that our interpretation of the statute creates a "gap" in plan funding that Congress could not have intended. Pet. Br. at 35-36. *Amici* complain that our reading of the statute causes "the payment of too little withdrawal liability." NCCMP Br. at 13; *accord* Central States Br. at 11. These arguments should be rejected.

As explained above, the statute does not authorize the assessment of withdrawal year interest. If the Plan re-

[35] Actuarial valuations typically take several months to prepare after the conclusion of the plan year. In this case, the governing actuarial valuation report was issued on June 17, 1981. J.A. 161. The Plan's 1979 actuarial report was issued on August 13, 1979, and the initial 1980 report states that it was prepared in May 1980. These reports appear in the record as part of Stipulated Exhibit 146.

ceived the amount of withdrawal liability that Congress said it was entitled to receive, then by definition Schlitz did not pay "too little withdrawal liability." Petitioner and *amici* may believe that it was unwise or unfair for Congress to have defined withdrawal liability as it did. But that is a complaint that can be redressed only by Congress itself.

In any event, the statutory scheme is not unfair to plans. There is no "gap" in funding that threatens the security of participants' retirement benefits. *See* Pet. Br. at 32, 33, 36. In addition, the statute includes a number of simplifying devices that have the effect of easing the administrative burden on plan sponsors. Some of these simplifications decrease the amount of the liability a withdrawing employer is required to pay. It was perfectly rational for Congress to have employed simplifying measures in the interest of enhancing efficiency, even at the expense of precision. Manifestly, the statute is not so unfair in its treatment of plans that the Court need resort to resolving any uncertainties in their favor.

A. In Most Cases Any "Gap" Will Be Considerably Less Than One Year

Petitioner warns that our reading of the statute produces a harmful "gap" in funding. *E.g.*, Pet. Br. at 33. But there need not be a substantial amount of time during which the plan does not receive payments from the withdrawing employer.

It must be kept in mind that the withdrawing employer is likely to make contributions to the plan for some or most of the year during which it withdraws. These contributions are required by statute to include payments to reduce the plan's unfunded liabilities. Under ERISA's minimum funding standards some portion of employer contributions to a plan must be applied to reduce the plan's underfunding. I.R.C. § 412(b)(2)(B)(i), (ii). Indeed, requiring amortization of the principal amount of a plan's accrued liability was the key innovation of

ERISA's funding rules.[36] Under the statutory scheme, then, it is fair to assume that a plan's underfunding will gradually *decrease* over time as contributions are received.

Therefore, no "gap" could begin until withdrawal and the cessation of contributions. Inevitably there will be some delay between withdrawal and the commencement of withdrawal liability payments. But the average period between the time contributions stop and the time payments of withdrawal liability begin need not be significant. Congress has created a scheme under which an employer's hypothetical payment schedule could be prepared as soon as the prior year's actuarial valuation is completed—probably about mid-year.[37] If an employer withdrew *after* the valuation was in hand, the plan sponsor could make its demand within a matter of days and payments would begin not later than 60 days thereafter. The delay would be longer if an employer withdrew toward the beginning of the plan year, before the actuarial valuation report was issued. But in the absence of unusual circumstances, the average "gap" should be no longer than a few months.[38]

Indeed, Petitioner's position unfairly assesses one year of interest when the "gap" can be much shorter. This was the situation in this case, and the Plan's interpretation of the statute results in a double assessment for a portion of

[36] Under prior law, there were no statutory funding rules. A revenue ruling issued by the Internal Revenue Service, however, had the effect of requiring funding sufficient to satisfy normal cost and *interest only* on past service liability. *See* Rev. Rul. 56-596, 1956-2 C.B. 288; *McGill & Grubbs* at 49.

[37] *See supra* note 35.

[38] More delay inheres in the scheme with respect to partial withdrawals, because calculation of the liability upon a partial withdrawal requires data that is not available until the end of the plan year following the partial withdrawal. 29 U.S.C. § 1386(a)(2). By definition, however, partial withdrawals have less impact on plan funding than complete withdrawals. The employer continues making *some* contributions, and under ERISA minimum funding rules some portion of the contributions to the plan must be applied to reduce the plan's underfunding.

the withdrawal year. Schlitz withdrew from the plan in August and began making payments of withdrawal liability shortly before November 1, 1981, and yet the Plan seeks to charge it a full year of interest.

Of course, in a given case the delay in making demand could be significantly longer—it took the *Huber* plan well over two years to make its demand. *See Huber*, 916 F.2d at 88. But such delays are the fault of the plan, not the withdrawing employer, and this feature of the statutory scheme creates an incentive for plans to act promptly to assess and collect withdrawal liability payments.[39]

B. Other Aspects of the Statutory Scheme Offset the Effect of Any "Gap"

The statutory scheme uses a "snapshot" of the Plan's UVB as of the end of the prior year as the basis for determining the amount of withdrawal liability. The actual amount of UVB is imprecise and can rise or fall over the course of the year. These fluctuations are likely to offset the effects of any gap in interest paid during the year of withdrawal.

In the first place, actuarial "science" is imprecise by nature. *See Concrete Pipe*, 113 S. Ct. at 2286. The amount of a plan's liability for future benefits cannot be known with certainty, since it depends upon future events. Using accepted actuarial principles, it is possible to arrive at a reasonable estimate, but an actuarial estimate

[39] Failure of the plan sponsor vigorously to pursue collection efforts subjects the sponsor to liability for fiduciary breach. *See Central States Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 559-60 (1985). If it appears that a plan has been genuinely harmed by a delay in receiving payments of withdrawal liability, it is likely that a cause of action will lie to make the plan whole. If the delay resulted from a lack of diligence by the plan's trustees, the trustees could be held personally liable for the plan's losses. 29 U.S.C. §§ 1104(a), 1109(a), 1132(a)(2). If, on the other hand, one of the plan's service providers was responsible, the plan could pursue remedies for negligence under state law. *See Huber*, 916 F.2d at 88 & n.2.

can be reasonable over a wide range.[40] In addition, the allocation of UVB among the employers is itself somewhat arbitrary. Neither the plan's UVB nor a particular employer's allocable share of UVB is a liquidated amount. Thus, it cannot be said with certainty that, under our reading of the statute, a plan "loses," dollar for dollar, the amount attributable to withdrawal year interest.

Second, actuaries tend to overstate plan liabilities by using conservative actuarial assumptions. For example, this Plan's interest rate assumption in 1981 was only 7 percent even though the Plan earned over 15 percent on its investments for fiscal 1980. *See* J.A. 174. If the plan's UVB is inflated, so is an employer's withdrawal liability. Yet an employer can rarely succeed in challenging the amount, because the actuary's assumptions are presumed correct in aribtration proceedings, and the arbitrator's findings are presumed correct upon judicial review. 29 U.S.C. § 1401(a)(3)(B), (c). Chances are good, then, that an employer pays *more* than its share of UVB even without the addition of withdrawal year interest.

Third, the formula for calculating the annual payment of withdrawal liability is skewed in the plan's favor. The annual payment is based on the average contribution base units for the *highest* three years during the preceding ten years and the *highest* contribution rate. 29 U.S.C. § 1399 (c)(1)(C)(i). Not infrequently, however, an employer's operations would have declined in the years immediately preceding its withdrawal. *McGill & Grubbs* at 630. In

[40] An example from the record highlights this principle. In 1980, the Plan's actuary liberalized the assumptions used to value the Plan—the interest rate assumption was increased from 5 percent to 7 percent, a different mortality table was used, and the retirement age assumption was adjusted to reflect the Plan's actual experience. Schlitz Exh. 58, at 1. According to the actuary, "The net effect of these changes was to reduce the normal cost by $914,077 and the accrued liability by $31,201,734." *Id.* Yet the actuary certified that both sets of assumptions were reasonable in the aggregate and, in combination, represented his "best estimate" of anticipated experience under the Plan. Schlitz Exh. 57, at 4; Schlitz Exh. 58, at 4.

those circumstances, the annual payment of withdrawal liability will *exceed* the amount of the employer's annual contributions in the most recent years prior to its withdrawal. Thus, any gap in funding should be made up in part by the higher level of withdrawal liability payments.

Fourth, the plan is revalued every year, and the minimum funding contribution is determined. To the extent later valuations should show an experience loss after a withdrawal, the amount is amortized over future years and made up in future contributions. *See supra* pages 7-8. Any such loss falls on the employers that continue to contribute to the plan, but it is spread among them and payable over a 15-year period. I.R.C. § 412 (b)(2)(B)(iv). This is not unduly harsh. In any event, any funding deficiency is the responsibility of the remaining employers and does not reduce the level of benefits that will be paid.

In fact, from the plan's perspective, it is probably preferable to increase contributions from continuing employers than to assess withdrawal year interest against a withdrawing employer. Since the withdrawing employer's annual payment is established independently of the amount of the liability, adding withdrawal year interest to the liability will not result in greater amounts being paid to the plan sooner. Rather, the effect will be to lengthen the payment schedule by adding payments at the end of the schedule. By contrast, the plan would benefit from increased contributions from contributing employers as soon as the increase took effect.

Thus, it is doubtful that the inability to assess interest for the year before payments begin causes any real "gap" in plan funding. Certainly, the statute is "fair" to plans on balance.

C. The Statute Rationally Sacrifices Some Precision to Enhance Efficiency

Petitioner asserts that unless withdrawal year interest is charged a withdrawing employer will not pay its full allocable share of UVB. Pet. Br. at 37. To the extent

that is true, it was a deliberate choice that Congress made in order to streamline the process.

Petitioner is correct that the amount of a plan's UVB at the time an employer withdraws will not be the same as it was on the valuation date—the last day of the preceding plan year. A plan's UVB changes over time, probably on a daily basis. Benefits are accrued, investment returns are earned, participants are added to and deleted from the plan's rolls. Thus the employer's allocable share of UVB on the date of withdrawal, on the date on which the actual payment schedule begins, and on the date on which the hypothetical payment schedule begins will *all* be different from its share as of the last day of the preceding plan year.

But this is not to say that adding withdrawal year interest will cure the problem; it will not. Updating the valuation by adding interest or adjusting the discount period alone will not render the calculation accurate. A complete revaluation of the plan as of the withdrawal date would be necessary to determine the employer's share of UVB with any reasonable degree of accuracy. And Congress wisely chose to spare plans the burden of completely revaluing the plan each time an employer withdraws.

In fact, such a requirement would have been unworkable. Valuing a pension plan is a complicated, time-consuming, and expensive undertaking. *See* NCCMP Br. at 6-7 & n.5. Had Congress not adopted the rule of thumb that withdrawal liability incurred within a given year is to be computed with reference to a single valuation, a plan's actuary could constantly be performing valuations. Even if there were only one withdrawal a year, inevitably there would be a significant lapse of time between the withdrawal and the commencement of liability payments. The scheme created by Congress, by contrast, permits plans to make demand promptly and begin receiving payments shortly thereafter.

The statute incorporates other simplifying measures. For example, it eliminates the need to make a present value adjustment when converting the annual payment schedule into quarterly payments. 29 U.S.C. § 1399(c)(1)(A)(i); PBGC Opinion No. 85-1. Obviously, the conversion would be more precise if such an adjustment were made to reflect the time value of money. But Congress apparently opted for simplicity rather than precision in this instance as well.

Moreover, employers generally are not required to pay their allocable share of UVB if the amount is *de minimis*. 29 U.S.C. § 1389(a). This spares plans the expense of administering a collection process that will produce an insubstantial benefit for the plan. *See* H.R. Rep. No. 869, pt. 1, at 76. And no employer is required to pay withdrawal liability for more than 20 years, which also reduces the record-keeping burden on the plan, in addition to providing relief to the withdrawing employer.

In summary, Congress reasonably decided to incorporate some simple rules of thumb into an otherwise complex statute. There is no reason for the Court to seek to improve upon Congress's handiwork by providing for the accrual of withdrawal year interest.

D. The Court Should Not Resolve Doubts Against Withdrawing Employers

The Plan urges the Court, in the event the language of the statute "leaves any doubt" on the issue presented, to construe the statute in its favor pursuant to "the clear purpose of ERISA and MPPAA." Pet. Br. at 31, 32. As explained in section II.A. above, this mode of analysis is flawed in any setting. It is particularly inappropriate here.

The Court should be chary about construing this statute against withdrawing employers. MPPAA has provoked serious constitutional challenges since its enactment because of its harsh treatment of withdrawing employers. In fact, for several years, parts of the statute were deemed unconstitutional within the Third Circuit under *Yahn &*

McDonnell.[41] This Court rescued those parts of the statute in *Concrete Pipe*, but only by means of a "hoary" rule of statutory construction—that in cases of ambiguity the Court will construe a statute to avoid constitutional problems. 113 S. Ct. at 2282-83. With the scales so sharply tilted against withdrawing employers like Schlitz, the judicial thumb of statutory construction should rest, if anywhere, on their side.

In ERISA, Congress apparently decided that multiemployer pension plans should be classified as defined benefit plans and subject to extensive regulation as such. This was a significant change, as at least one participant in the process recognized:

> [W]e have taken something that neither looked like a duck, or walked like a duck, or quacked like a duck, and we passed a law [ERISA] and said, "It is a duck." . . .
>
> It is treating the multiemployer plans where you negotiate a contribution as having put a legal obligation on the employer to reach a level of benefits that has caused the problem.

Education & Labor Hearings, App. B n.3, at 391 (statement of Rep. Erlenborn). Employers were made liable not just for the contributions that they agreed to make in collective bargaining but also for any excess over that amount needed to satisfy ERISA's minimum funding rules. These plans were also subjected to ERISA's termination insurance provisions, which as originally drafted would have made an employer liable for part of the plan's underfunding if the plan terminated within five years of the employer's withdrawal.

Faced with these changes in the basic rules, it is not surprising that employers would withdraw from multiemployer plans in droves. *See generally* Wayne Jett, *The Path to Destruction of Taft-Hartley Pension Trusts: Man-*

[41] *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128, 138-42 (3d Cir. 1986), *aff'd by an equally divided Court sub nom. PBGC v. Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987).

datory "Defined Benefit Plan" Status, reprinted in Education & Labor Hearings, App. B n.3, at 1134. Such conduct, in turn, would seriously affect the financial stability of those plans. MPPAA was designed in part to stop the potential exodus from multiemployer plans by holding employers liable for the underfunding of vested benefits even upon withdrawal.

Not only did MPPAA impose a substantial new liability, but it did so retroactively. As enacted in September 1980, the statute imposed withdrawal liability on employers that had withdrawn as early as April 1980. *See* Pub. L. No. 96-364, § 108(c)(1), 94 Stat. 1267 (1980).[42] In addition, for those employers that had contributed to the plan before the April effective date, liability included a share of the plan's UVB that had accumulated prior to the effective date. Pub. L. No. 96-364, § 103, 94 Stat. 1216, 1227.

MPPAA's liability assessment and collection procedures are also tilted against the withdrawing employer. As explained above, the amount of the liability is based on the plan's UVB. The UVB, in turn, is calculated by applying a set of actuarial assumptions to the available data. Actuaries have a professional responsibility to ensure adequate plan funding and tend to use conservative assumptions. *Vinson & Elkins*, 99 T.C. at 26-27. Actuaries are hired by the plan sponsor, which has a fiduciary duty to protect the interests of the plan's participants and beneficiaries. *See generally Concrete Pipe*, 113 S. Ct. at 2276; *Connolly*, 475 U.S. at 233-34 (O'Connor, J., concurring). With these forces at work, it is likely that a plan's UVB will be overstated to some extent.

To be sure, a withdrawing employer has the right to challenge the amount of the withdrawal liability as calculated by the plan. But even here, the employer is at a disadvantage. The employer must make payments in ac-

[42] This feature of the statute was upheld against a constitutional challenge in *PBGC v. R.A. Gray & Co.*, 467 U.S. 717 (1984). In 1984 the statute was amended to eliminate this retroactivity. Pub. L. No. 98-369, § 558, 98 Stat. 899 (1984).

cordance with the plan's payment schedule while its challenge is being resolved; the obligation is not stayed even if the plan's calculation was wrong. 29 U.S.C. § 1399 (c)(2). Disputes are submitted to mandatory arbitration, 29 U.S.C. § 1401(a)(1), and the burden is on the employer to prove both that the factual determinations of the plan sponsor were erroneous and that the actuarial assumptions and methods were unreasonable. 29 U.S.C. § 1401(a)(3). Although these provisions pass constitutional muster under *Concrete Pipe*, it is nevertheless unusual for the burden of proof to be placed on the debtor instead of on the claimant.

The arbitrator's award is subject to review in the courts. 29 U.S.C. § 1401(b)(2). Again, however, the employer bears a difficult burden. In any such judicial proceeding, "there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." 29 U.S.C. § 1401 (c). The reasonableness of actuarial assumptions is a question of fact. *Vinson & Elkins*, 7 F.3d at 1237. It will be the rare case indeed in which an employer succeeds in challenging the plan's UVB calculation.

Under these circumstances, the courts should be hesitant to impose financial obligations on withdrawing employers unless the statute clearly requires them. If the statute is silent, the courts should not impose liability.

CONCLUSION

For the reasons stated herein, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

RICHARD K. WILLARD
(Counsel of Record)
SARA E. HAUPTFUEHRER
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795
(202) 429-3000

JAMES W. GREER
DAVID C. HERTEL
WHYTE HIRSCHBOECK DUDEK S.C.
Suite 2100
111 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 273-2100

Counsel for Respondents

September 19, 1994

APPENDICES

APPENDIX A

PBGC Bill (H.R. 3904)
as Amended in Initial Markup [*]

"SEC. 4201. (a)(1) Except as provided in subsection [(e)](*d*), an employer that withdraws from a multiemployer plan is liable to the plan for the amount determined under subsection [(d)] (*e*), (*f*), *or* (*g*), *whichever is applicable*, and shall pay the liability[, plus interest,] in accordance with subsection [(e)](*i*).

Pub. L. No. 96-364

"Sec. 4201. (a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

"(b) For purposes of subsection (a)—

"(1) The withdrawal liability of an employer to a plan is the amount determined under section 4211 to be the allocable amount of unfunded vested benefits, adjusted—

"(A) first, by any de minimis reduction applicable under section 4209,

"(B) next, in the case of a partial withdrawal, in accordance with section 4206,

"(C) then, to the extent necessary to reflect the limitation on annual payments under section 4219(c)(1)(B), and

"(D) finally, in accordance with section 4225."

---

[*] The original bill is set in regular type. Bracketed language was deleted in the markup; italicized language was added. The comparable provisions of the bill as enacted are set in boldface.

Sec. 4201. "[(e)(1)] (*i*)(*1*) As soon as practicable after an employer withdrawal *or partial withdrawal,* the plan [administrator] *sponsor* shall notify the employer of the amount of the liability and the schedule of liability payments, determined under this subsection, and shall, consistent with subsection [(f)] (*j*), demand payment in accordance with the schedule."

Sec. 4219. (b). "(1) As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall—

(A) notify the employer of—

(i) the amount of the liability, and

(ii) the schedule for liability payments, and

(B) demand payment in accordance with the schedule."

"(2)(*A*) Except as provided in *paragraph 2(C) and in* paragraphs (6) and (7), an employer shall pay the liability determined under subsection [(d)] (*e*), (*f*), *or* (*g*), *whichever is applicable,* over [a] *the* [period of years in annual amounts, including accrued interest on the outstanding principal, equal to the greater of—]

["(A) the average of the employer's required annual contributions under the plan for the 3 plan years preceeding the date of the withdrawal, or]

["(B) the amount necessary to amortize the employer's liability (plus accrued interest) in equal annual installments over a period of 15 years, until fully amortized.] *lesser of—*

"(i) 30 years, or

"(ii) the period of years necessary to amortize the liability in level annual payments, determined under paragraph (B) as if each payment were made at the end of the year in which it is due.

The determinaiton of the amortization period shall be based on the assumptions used for the most recent actuarial valuation for the plan.

"(B) The amount of each annual payment shall be the product of—

"(i) the average number of contribution base units for the 3 years during the 10 plan years ending with the year of withdrawal in which the number of contribution base units for which the employer had an obligation to make contributions under the plan is the highest, and

"(ii) the highest contribution rate which the employer had an obligation to contribute under the plan in effect during the 10 plan years ending with the year of withdrawal."

"(c)(1)(A)(i) Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraph (4) and (5), an employer shall pay the amount determined under section 4211, adjusted if appropriate first under section 4209 and then under section 4206 over the period of years necessary to amortize the amount in level annual payments determined under subparagraph (C), calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent plan year. Actual payment shall commence in accordance with paragraph (2).

"(ii) The determination of the amortization period described in clause (i) shall be based on the assumptions used for the most recent actuarial valuation of the plan.

"(B) In any case in which the amortization period described in subparagraph (A) exceeds 20 years, the employer's liability shall be limited to the first 20 annual payments determined under subparagraph (C).

"(C)(i) Except as provided in subparagraph (E), the amount of each annual payment shall be the product of—

"(I) the average annual number of contribution base units for the period of 3 consecutive plan years, during the period of 10 consecutive plan years ending before the plan year in which the withdrawal occurs, in which the number of contribution base units for which the employer had an obligation to contribute under the plan is the highest, and

"(II) the highest contribution rate at which the employer had an obligation to contribute under the plan during the 10 plan years ending with the plan year in which the withdrawal occurs."

"[(4)] (3) Withdrawal liability [(plus accrued interest)] shall be payable in accordance with the schedule set forth by the plan [administrator] *sponsor* under paragraph (1), beginning no later than 60 days after the date of the demand."

"(2) Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule."

"[(3)] *(4)* Each amount determined under paragraph (2) shall be payable in four equal installments due quarterly, or at other intervals specified by plan rules. *If a payment is not made when due, interest on the payment shall accrue from the due date until the date on which the payment is made.*"

"(3) Each annual payment determined under paragraph (1)(C) shall be payable in 4 equal installments due quarterly, or at other intervals specified by plan rules. If a payment is not made when due, interest on the payment shall accrue from the due date until the date on which the payment is made."

"(6) The employer shall be entitled to prepay the outstanding amount of its withdrawal liability, plus accrued interest, *if any*, in whole or in part, without penalty."

"(4) The employer shall be entitled to prepay the outstanding amount of the unpaid annual withdrawal liability payments determined under paragraph (1)(C), plus accrued interest, if any, in whole or in part, without penalty. * * *"

"(7) A plan [administrator] *sponsor* may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest *on the total outstanding liability from the due date of the first payment that was not timely made*, in the event of a default. For purposes of this section, 'default' means—

"(A) the failure of an employer to make, when due, any payment under this subsection, if the failure is not cured within 60 days after the employer receives written notification from the plan [administrator] *sponsor* of the failure, and

"(B) any other event defined in rules adopted by a plan that indicates a reasonable likelihood that an employer will be unable to pay its withdrawal liability."

"(5) In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. For purposes of this section, the term 'default' means—

"(A) the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure, and

"(B) any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability."

"(5) Interest under this subsection shall be charged [from the date of the withdrawal] at rates based on prevailing market rates for comparable obligations, in accordance with regulations of the corporation."

"(6) Except as provided in paragraph (1)(A)(ii), interest under this subsection shall be charged at rates based on prevailing market rates for comparable obligations, in accordance with regulations prescribed by the corporation."

<table>
<tr><th></th><th colspan="2">HOUSE</th><th colspan="2">SENATE</th></tr>
<tr><td>BILL INTRODUCED AND REFERRED TO COMMITTEES</td><td colspan="2">H.R. 3904
May 3, 1979[1]</td><td colspan="2">S. 1076
May 3, 1979[2]</td></tr>
<tr><td></td><td>Education & Labor Committee</td><td>Ways & Means Committee</td><td>Labor & Human Resources Committee</td><td>Finance Committee</td></tr>
<tr><td>HEARINGS</td><td>Jun. 5 & 7, 1979[3]</td><td>Jun. 25, 1979[4]
Feb. 19, 1980[5]</td><td>Jun. 26 & 27, 1979[6]</td><td>Mar. 18, 1980[7]</td></tr>
<tr><td>SUBCOMMITTEE MARK-UP</td><td>Dec. 13, 1979[8]</td><td>--</td><td>--</td><td>--</td></tr>
<tr><td>FULL COMMITTEE REPORT</td><td>Apr. 2, 1980[9]</td><td>Apr. 23, 1980[10]</td><td colspan="2">Jul. 24, 1980[11]</td></tr>
<tr><td>FLOOR DEBATE AND INITIAL PASSAGE</td><td colspan="2">May 21-22, 1980[12]</td><td colspan="2">Jul. 29, 1980[13]</td></tr>
<tr><td>SUBSEQUENT PASSAGE OF AMENDED VERSION</td><td colspan="2">Aug. 25, 1980[14]</td><td colspan="2">Aug. 26, 1980[15]</td></tr>
<tr><td>ASKS FOR/AGREES TO CONFERENCE</td><td colspan="2">Aug. 28, 1980[16]</td><td colspan="2">Sep. 8, 1980[17]</td></tr>
<tr><td>CONFERENCE REPORT</td><td colspan="4">Sep. 18, 1980[18]</td></tr>
<tr><td>FINAL PASSAGE</td><td colspan="2">Sep. 19, 1980[19]</td><td colspan="2">Sep. 18, 1980[20]</td></tr>
<tr><td>SIGNED BY PRESIDENT</td><td colspan="4">Sep. 26, 1980[21]</td></tr>
</table>

1/ 125 Cong. Rec. 9,702 (1979); see also id. at 9,643.

2/ 125 Cong. Rec. 9,783 (1979); see also id. at 9,800-22.

3/ Hearings on the Multiemployer Pension Plan Amendments Act of 1979 Before the Task Force on Welfare and Pension Plans of the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor, 96th Cong., 1st Sess. (1979).

[6] Multiemployer Pension Plan Termination Insurance Program, Hearing before the Subcomm. on Oversight of the House Comm. on Ways and Means, 96th Cong., 1st Sess. (1979).

[7] The Multiemployer Pension Plan Amendments Act of 1979, Hearing Before the House Comm. on Ways and Means, 96th Cong., 2d Sess. (1980). Starting at page 3, this volume reproduces Staff of the Joint Comm. on Taxation, 2d Sess., Description of H.R. 3904 (As reported by the Comm. on Education and Labor) Relating to Multiemployer Pension Plan Amendments Prepared for Use of the House Comm. on Ways and Means (Jt. Comm. Print 1980).

[8] Multiemployer Pension Plan Amendments Act of 1979, Hearings Before the Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess. (1979).

[9] Pension Plan Termination Insurance for Multiemployer Pension Plans, Hearing before the Subcomm. on Private Pension Plans and Employee Fringe Benefits of the Senate Comm. on Finance, 96th Cong., 2d Sess. (1980).

[9] Amendment in the nature of a substitute for H.R. 3904, as reported by Subcommittee on Labor-Management Relations of the House Committee on Education and Labor on Dec. 13, 1979, reproduced in Education & Labor Hearings, supra note 3, at 114 ff.

[9] H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 1 (1980), reprinted in 1980 U.S.C.C.A.N. 2918. See 126 Cong. Rec. 7,489 (1980).

[10] H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 2 (1980), reprinted in 1980 U.S.C.C.A.N. 2993. See 126 Cong. Rec. 8,864 (1980).

[11] Reported jointly by both committees, with no written report. See 126 Cong. Rec. 19,598-601 (1980). See also 126 Cong. Rec. 20,189 ff. (1980) ("Joint Explanation of S. 1076").

[12] 126 Cong. Rec. 11,990-98, 12,176-234 (1980).

[13] 126 Cong. Rec. 20,148-277 (1980). H.R. 3904 was passed after being amended to substitute the language of S. 1076 as amended.

[14] 126 Cong. Rec. 23,003-50 (1980). The House agreed to Senate amendments to H.R. 3904, with further amendments.

[15] 126 Cong. Rec. 23,280-91 (1980). The Senate agreed to the House Amendments to the Senate Amendments to H.R. 3904, with further amendments.

[16] 126 Cong. Rec. 23,645-47 (1980).

[17] 126 Cong. Rec. 24,541 (1980).

[18] H.R. Conf. Rep. No. 1343, 96th Cong., 2d Sess. (1980), reprinted in 1980 U.S.C.C.A.N. 3066. See 126 Cong. Rec. 26,361 (1980).

[19] 126 Cong. Rec. 26,361-42 (1980).

[20] 126 Cong. Rec. 26,040-41 (1980).

[21] Pub. L. No. 96-364, 94 Stat. 1208 (1980).